

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6124

~~77-3047~~

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOEL HARNETT, et al.,

Plaintiffs-Appellees,

v.

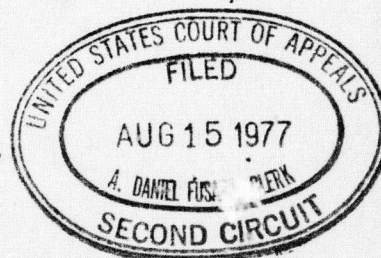
SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellant,

and

EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES,

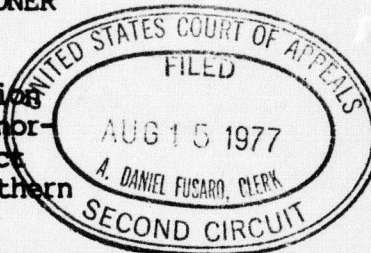
Defendant.



Appeal from the United States District Court
for the Southern District of New York

IN RE SECURITIES AND EXCHANGE COMMISSION, PETITIONER

Petition of the Securities and Exchange Commission
for Writs of Mandamus and Prohibition to the Honorable
Vincent L. Broderick, United States District
Judge, United States District Court for the Southern
District of New York



OPENING BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6124

JOEL HARNETT, et al.,

Plaintiffs-Appellees,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellant,

and

EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES,

Defendant

Appeal from the United States District Court
for the Southern District of New York

No. 77-

IN RE SECURITIES AND EXCHANGE COMMISSION, PETITIONER

Petition of the Securities and Exchange Commission
for Writs of Mandamus and Prohibition to the Honor-
able Vincent L. Broderick, United States District
Judge, United States District Court for the Southern
District of New York

OPENING BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

PRELIMINARY STATEMENT

The Securities and Exchange Commission (the "Commission"), one of
the defendants below in a suit purportedly brought pursuant to the Freedom
of Information Act ("FOIA"), 5 U.S.C. 552, 1/ appeals from mandatory

1/ Joel Harnett; et al. v. Securities and Exchange Commission; et al.,
No. 77 Civ. 3110 (VLB) (S.D. N.Y.).

and declaratory orders entered by the court below in a case in which, we submit, that court had no jurisdiction. Alternatively, the Commission respectfully prays that writs of mandamus and prohibition issue from this Court, directing the Honorable Vincent L. Broderick, District Judge of the United States District Court for the Southern District of New York, to dismiss the action below and prohibiting the District Judge from enforcing its orders entered on August 1 and 2, 1977. 2/

The orders below, of which the Commission seeks review, are:

(1) a declaratory order, entered by the lower court on August 2, 1977 (A. 389), denying the Commission's motion to dismiss for lack of jurisdiction and asserting the district court's jurisdiction of this action under the FOIA (a) even though no FOIA request had been made to, or ruled upon by, the Commission; and (b) notwithstanding the district court's finding that there did not exist any document corresponding to the document the plaintiffs conceivably could have been construed to have requested of the Commission; and

(2) a mandatory order, entered by the district court on August 1, 1977 (A. 329), compelling the Commission to produce, for the district judge's in camera inspection, certain draft portions of staff memoranda currently

2/ On August 2, 1977, the Commission filed a notice of appeal from the two orders of the United States District Court for the Southern District of New York which are also the subjects of the requested writs (A. 391). Although the Commission believes that it may appeal as of right from the orders entered below, pursuant to 28 U.S.C. 1291 and 28 U.S.C. 1292(a), it has also filed a petition for writs of mandamus and prohibition as a precautionary measure, to ensure the proper invocation of this Court's jurisdiction. This brief is both the Commission's opening brief on appeal and the brief in support of the petition for writs of mandamus and prohibition.

References to the record in the court below will be cited to the appendix filed herewith as "A. ...". This appendix consolidates the appendix filed with this Court on August 5, 1977, and the Supplemental Appendix filed on August 12, 1977, in connection with the Commission's motion for a stay pending appellate review.

being written by the Commission's staff in connection with its investigation of transactions in securities issued by the City of New York, notwithstanding the facts that

- (a) the draft portions of the draft staff memoranda ordered to be produced are the work product of Commission attorneys engaged in an ongoing law enforcement investigation;
- (b) the Commission sustained its burden of showing, as the district judge conceded, that the documents in question were predecisional staff memoranda and work product which had been compiled for law enforcement purposes; 3/
- (c) the district judge conceded that requiring the Commission to produce the documents in question would interfere with, and disrupt an ongoing law enforcement investigation;
- (d) Section 21(a) of the Securities Exchange Act, 15 U.S.C. 78u(a), vests exclusively in the Commission (and not the federal courts) the right to decide whether, and when, to issue any report of the findings of its law enforcement investigations, as well as to decide what the contents of such a report should be; and
- (e) the Commission had met its burden of showing, through affidavits and representations of counsel accepted by the court in lieu of proffered testimony, that the draft portions of memoranda are exempt from compelled production under the FOIA pursuant to Exemptions 5 and 7(A) of that Act, 5 U.S.C. 552(b)(5), (b)(7)(A).

The action in the court below reflects an attempt by the plaintiffs to obtain judicial review of an alleged agency denial of an FOIA request that, in fact, was never made, for a document that did not exist. Rather than dismissing an action over which it had no jurisdiction, however, the court below unnecessarily and incorrectly enmeshed itself in the task

3/ The order for in camera inspection itself reflects both the privileged and predecisional nature of the documents in question:

"It is ordered that the Securities and Exchange Commission submit to me, for in camera inspection, those portions of the report to the Commission by the New York Regional Office of the Commission concerning transactions in the securities of the City of New York and related matters which have been drafted and submitted to the Administrator or the Associate Administrator of the New York Regional Office * * *."

(A. 329)

of supervising an ongoing agency law enforcement investigation, even though it recognized that the orders it entered would impair the Commission's ability expeditiously to complete the investigative task the Commission had undertaken for the benefit of public investors.

The Commission is not invoking this Court's jurisdiction lightly or routinely. It recognizes that insignificant or nonprejudicial errors of law and fact do occur, both in the courts and before administrative agencies, and that litigants (especially government litigants) have a responsibility to avoid time-consuming appeals (or petitions for extraordinary writs) where any errors that were committed are of that nature. This, however, is not such a case.

Enforcement of the law is a primary responsibility of the Commission. And, while freedom from scrutiny is not a freedom that Congress has afforded administrative agencies, freedom from unwarranted interference with ongoing agency attempts to complete a law enforcement investigation and to exercise appropriate prosecutorial discretion is a freedom that agencies properly may, and must, claim. The FOIA does not divest the Commission of its statutory enforcement prerogatives, notwithstanding the district court's understandable concern for the welfare of New York City's voters.

The action below, a politically inspired press relations gambit, was frivolous; but, as recognized by the district court, this appeal and petition are from orders "that * * * have ramifications which undoubtedly may go far beyond this case." 4/ If allowed to stand, the decision below could encourage not just the aspirant for public office and his supporters

4/ A. 444.

involved here, but possible defendants in Commission enforcement proceedings as well, to utilize the FOIA to disrupt ongoing Commission investigations. Up to this point, the courts consistently have rebuffed such attempts to write into the FOIA what Congress so painstakingly wrote out. Faced as it is with the prospect of disrupted enforcement proceedings and the utilization of the FOIA for harrassing purposes, the Commission respectfully urges this Court to correct the serious errors of the court below.

JURISDICTION

This appeal from the orders of the court below is taken pursuant to 28 U.S.C. 1291 and 1292(a). The jurisdiction of this Court to issue writs of mandamus and prohibition is invoked under the All Writs Act, 28 U.S.C. 1651(a). 5/

QUESTIONS PRESENTED

1. May a district court assert jurisdiction over an action brought solely pursuant to the FOIA, where no request for documents was ever made to, or disposed of by, the agency from which the documents allegedly were sought?
 2. Where a document allegedly requested of an agency under the FOIA indisputably did not exist, may a district court nevertheless exercise jurisdiction of an action under the FOIA to determine whether the plaintiffs should be given access to some other documents that might be in the agency's possession?
 3. Where an agency has never had the opportunity to consider whether
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5/- The Commission has already discussed in detail its proper invocation of this Court's jurisdiction under 28 U.S.C. 1291, 1292(a) and 1651(a). See Memorandum in Opposition to Plaintiffs-Appellees' Motions to Vacate the District Court's Stay Order and to Dismiss this Appeal, filed August 12, 1977.

it would produce a document allegedly requested of it under the FOIA or what statutory exemptions might be available to deny production, may a district judge nevertheless order in camera inspection of agency records to determine the validity of exemptions the court supposes the agency might have claimed had the agency been given the opportunity to do so?

4. Is a district court compelled, as a matter of law, to require the in camera inspection of Commission records where it is undisputed, and the lower court so finds, that no FOIA request was ever made to the Commission, that the only document the plaintiffs could have been deemed to have requested from the Commission did not exist, and that the only conceivably relevant records possessed by the agency were predecisional draft staff memoranda and investigatory records compiled solely for law enforcement purposes, the compilation and production of which the court found would itself "interfere with the ability of the SEC to perform its law enforcement functions with dispatch"? (A. 347).

5. May a district court, in a lawsuit purportedly brought under the FOIA, assert supervisory control over the Commission's law enforcement investigation, and divest the Commission of its "absolute discretion" 6/ to determine whether, and when, to prepare and issue a report of its staff's law enforcement investigation?

STATEMENT OF THE FACTS

1. The Commission's Ongoing Investigation

On January 8, 1976, the Commission announced that it had commenced a nonpublic law enforcement investigation pursuant to Section 20(a) of the Securities Act of 1933, 15 U.S.C. 77t(a), and Section 21(a) of the Securities

6/ See, e.g., Dyer v. Securities and Exchange Commission, 291 F.2d 774, 781 (C.A. 8, 1961).

Exchange Act of 1934, 15 U.S.C. 78u(a), 7/ "to determine whether any violations of those Acts have occurred or are occurring," in connection with "transactions in the securities of the City of New York and related matters" (A. 239).

That investigation is still in progress. While most of the information necessary to the completion of the investigation has been collected, not all of it has been, and the investigative process itself is, therefore, still continuing (A. 180-181). 8/ The staff of the Commission's New York Regional Office is, at the present time, primarily engaged in endeavoring to organize, index and analyze the information already gathered to date, and the information still being gathered. Draft portions of the staff's memorandum, which will, after further editing and appropriate revision, soon be presented to the Commission for its consideration and review, are currently being prepared (A. 181). The comprehensive staff memorandum will ultimately be used by the Commission as a basis for determining what action, if any, to pursue.

At the present time, there is a concrete prospect that law enforcement proceedings will result from the Commission's investigation. As the Supreme Court has recognized, the Commission has "an arsenal of flexible

7/ Section 21(a) provides, in pertinent part (emphasis supplied):

"The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title [and] the rules or regulations thereunder * * *. The Commission is authorized, in its discretion, to publish information concerning any such violations * * *."

8/ Pursuant to the authority delegated in the Commission's Formal Order of Investigation, the staff has issued subpoenae even since the district court issued its stay order on Thursday, August 4, 1977. See Affidavit of William D. Moran, dated August 11, 1977, attached to this brief, infra, at pp. 1b, et seq.

enforcement powers," 9/ and enforcement action could take any one or more of the following forms: (1) the institution of a civil injunctive action against "any person" 10/ to prevent future violations of the federal securities laws; (2) the institution of an administrative proceeding against persons or entities whose conduct is directly regulated by the Commission to determine whether remedial action is necessary; (3) a referral of the Commission's records and files to the Attorney General of the United States for possible criminal prosecution; and (4) the issuance of a public report setting forth the results of the Commission's investigation. 11/ As was demonstrated to the court below (see, e.g., A. 81, 335, 351, 355), the disclosure sought by the plaintiffs herein will not only interfere with any Commission decision to implement one or more of these options, it will substantially foreclose the Commission from exercising its own discretion to choose the last of these options -- the publication of a report of investigation -- despite the fact that a decision relating to the issuance of such a report, including the timing of its release, is a law enforcement decision which is expressly committed to the Commission's "absolute discretion as to exercise and exclusive judgment as to field and scope." 12/

9/ Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976).

10/ In 1975, the Congress amended the definition of the term "person" set forth in Section 3(a)(9) of the Securities Exchange Act, 15 U.S.C. 78c(a)(9), to include "a natural person, company, government, or political subdivision, agency, or instrumentality of government."

11/ In addition as a result of its investigation, the Commission could promulgate additional rules or regulations under the federal securities laws or it could submit recommendations to the Congress for additional legislation.

12/ Dyer v. Securities and Exchange Commission, 291 F.2d 774, 781 (C.A. 8, 1961). See also, Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 952 (C.A. 9, 1976); Kukatush Mining Corp. v. Securities and Exchange

Reports made pursuant to Section 21(a) have, in the past, 13/ served as an important enforcement tool to effect the public dissemination of information while, at the same time, providing a powerful impetus for regulatory reform. In some cases, a report of investigation will not, if carefully reviewed by the agency, adversely affect the prospects of subsequent law enforcement action. But, in all cases, care must be taken to avoid prejudicing additional enforcement alternatives. Here, the Commission has not finally determined whether to issue a report pursuant to Section 21(a) at all, although, if the release of a report can be effected without destroying other enforcement alternatives, it is desirous of doing so promptly. The action below threatens to preclude the Commission from making a decision whether to exercise this enforcement option as an effective alternative.

2. The Nature of this Action; and Its Explicitly Political Purpose

During the pendency of the Commission's investigation, Joel Harnett, one of the plaintiffs in the court below, 14/ announced his candidacy for the Democratic Party's nomination for Mayor of the City of New York (Compl.

12/ (continued)

Commission, 309 F.2d 647 (C.A. D.C., 1962); Schmidt v. United States, 198 F.2d 32 (C.A. 7), certiorari denied, 344 U.S. 896 (1952), Securities and Exchange Commission v. Republic National Life Insurance Co., 383 F. Supp. 436 (S.D. N.Y., 1974).

13/ See, e.g., Staff Report of the Securities and Exchange Commission to the Special Subcommittee on Investigations, 92d Cong., 2d Sess., Report on the Financial Collapse of the Penn Central Company (Subcomm. Print, 1972); Securities and Exchange Commission, Report on Investigation, In the Matter of Disclosure by Registrants Engaged in Defense Contracting (1970).

14/ The other plaintiffs are Save Our City, Inc., alleged to be a not-for-profit corporation organized under the laws of the State of New York, which supports Mr. Harnett's candidacy (Compl. ¶¶ 2 and 3, A. 1-2; see also Compl. Ex. A, A. 22); and Mr. Gordon Marshall, who appeared in the action below pro se "as a resident and citizen of the City of New York" and as attorney for the other plaintiffs (Compl. ¶ 4, A. 3).

¶1, A. 1). In the asserted belief that the Commission's investigation had been completed (Compl. ¶11, A. 5), and in the alleged belief that the Commission had prepared and completed a report of the results of its investigation (Compl. ¶12, A. 5) but was refusing, for political considerations, to release its report until after the New York City mayoral primary, this suit was instituted in the court below, in purported reliance upon the FOIA,

"to prevent a few bureaucrats in Washington who may be politically motivated from manipulating and affecting the results of the Primary Election in New York by unilaterally deciding to withhold the SEC Report from the public prior to the selection by the citizens of the City of New York of candidates for Mayor of the City of New York."

(Harnett Aff. ¶20, A. 45.) The lawsuit was instituted because Mr. Harnett supposed that

"the SEC is contemplating writing an expurgated or censored version of the Report. I believe that the morality of government in the United States and in the City of New York has progressed beyond the point where the people of the City of New York in exercising their right to vote should be subjected to edited versions of the SEC Report any more than it was morally right for the people of the United States to have to contend with 18 minute gaps and other deletions in the Nixon tapes. * * * We want no 18 minute nor 30 second gaps in the Report of the SEC as it was delivered by the New York Regional Office to the Home Office in Washington."

(Harnett Aff. ¶29-30, A. 48.)

3. The Spurious FOIA Request

In point of fact, however, the institution of the suit below was the first indication to the Commission that the plaintiffs had sought any documents under the FOIA. 15/ Indeed, this action has arisen from nothing more

15/ At oral argument on July 26, 1977 (A. 96-97), and subsequently in an affidavit (A. 210), Mr. Marshall, a plaintiff in the action and counsel for all three plaintiffs below, asserted that the FOIA had been discussed in a telephone conversation on May 2, 1977, with

than an exchange of correspondence among the named parties in which no request for specific records was ever made pursuant to the FOIA. Prior to the institution of this suit, that correspondence was an undifferentiated part of the mass of correspondence routinely handled by the Commission. It was not treated, by either the plaintiffs or the Commission, as a request under the FOIA. This fact is made evident by the pertinent portions of the correspondence cited in the plaintiffs' complaint (¶¶27-38, A. 12-18), in which a generalized interest was expressed in what the plaintiffs characterized "the SEC Report of the results of its investigation of the sale of New York City bonds and securities * * *" (A. 12).

On May 2, 1977, Harvey L. Pitt, General Counsel to the Commission, orally advised one of the plaintiffs that no such report existed as yet, and that he could not say when the staff's investigation would be complete (A. 13). On May 6, 1977, this was confirmed in a follow-up letter to Mr. Marshall, noting, among other things, "that the staff is making every effort to expedite the investigation" (A. 13). The plaintiffs apparently understood then that neither the Commission's staff investigation nor its report was complete, for, on May 5, 1977, the plaintiff Harnett sent a mailgram to the President requesting that the President "direct the Chairman of the Securities & Exchange Commission to order the completion and release of the report no later than June 1, 1977"

15/ (continued)

Mr. Pitt, the Commission's General Counsel. Mr. Pitt orally advised the court below (A. 112) that no such discussion had occurred, and submitted an affidavit explaining why such a discussion could not have occurred (A. 249-252). The lower court declined to consider that question, however (A. 282, 384), an appropriate result in light of 17 CFR 200.80(d)(9), the Commission's rule under the FOIA deeming oral communications of FOIA requests to be insufficient to invoke the agency's FOIA processes.

(A. 22, emphasis supplied). 16/

In five separate letters, and one telephone conversation involving the plaintiffs, two facts emerge -- (1) the plaintiffs' correspondence reflected, at most, only a request to the head of an agency that the agency complete an investigation and issue a report to the public; and (2) the plaintiffs were told, and knew, that the Commission's investigation was not completed and that no report of any investigation existed. Nowhere in any of the plaintiffs' correspondence is there any mention of the FOIA or any request for specific, existing documents under the FOIA; for that reason, no decision was made at or by the Commission as to whether any documents were required to be made available under the FOIA, or whether any documents should be made available in the exercise of the Commission's discretion.

4. Proceedings in the Court Below

On June 27, 1977, the plaintiffs instituted this action (A. 1-23), for the first time indicating that they intended their correspondence to serve as an FOIA request. And, although the only document to which Mr. Marshall's earlier correspondence had referred was an alleged "SEC Report on the results of its investigation," the plaintiffs' complaint sought an order from the court below compelling the Commission "to produce and deliver * * * any and all records and reports of the * * * Commission * * * concerning [its] investigation * * * into and relating to the sale of municipal bonds and securities of the City of New York * * * (A. 20, emphasis supplied). 17/

16/ This did not, however, prevent Mr. Marshall from representing, before the district court, that the plaintiffs believed the report might, in fact, be complete. See, e.g., A. 142.

17/ As events turned out, this was only the first of many refinements of the plaintiffs' request. Throughout the proceedings in the court below, the focus of the plaintiffs' demands shifted and changed. Thus, for

On July 21, 1977, counsel for the plaintiffs notified counsel for the defendants by telephone of his intention to seek a temporary restraining order pursuant to Rule 65(b) of the Rules of Federal Civil Procedure, by means of an order to show cause (A. 58a). Although Commission counsel expressed their desire and willingness to be present for argument before any order to show cause was entered by the court below (A. 58a), an ex parte order was entered by the district court on July 22, 1977, directing the Commission to appear before the district court on July 26, 1977, and to bring

"the complete SECURITIES AND EXCHANGE COMMISSION Report relating to the sale of municipal bonds and securities of the City of New York and the finances of the City of New York and all of the transactions relating thereto * * * to [the] Court on the return date of this motion for the purposes set forth in [5 U.S.C.] Section 552 * * *" (A. 57).

That order also directed the defendant Securities and Exchange Commission to show cause why an order should not be entered directing that "the Report of the SECURITIES AND EXCHANGE COMMISSION (including but not limited to the report of the New York Regional Office of the SECURITIES AND EXCHANGE COMMISSION)" be produced and delivered to the court for in camera inspection to enable the court to determine whether that "report" or any part thereof should be released pursuant to the FOIA.

17/ (continued)

example, at one point, Mr. Marshall stated "I am interested in getting at the raw facts that the SEC has uncovered," suggesting that what the plaintiffs wanted was the transcripts of testimony and documents subpoenaed by the Commission during its investigation (A. 108). At another point, he articulated the goal of his suit as being "the disclosure of the fruit of the [Commission's] investigation" (A. 134). Finally, the plaintiffs settled on the records defined by the court itself: those portions of a staff memorandum which had been drafted (A. 152). Subsequently, the court refined this yet further, defining the subject matter of its order as those draft portions which had been transmitted to two specified senior officials at the Commission's New York Regional Office (A. 329).

The Commission, on July 22, 1977, moved to dismiss the complaint on the grounds that: (1) no request had been made in accordance with the procedures set forth both in the FOIA and the Commission's rules implementing the FOIA; (2) the plaintiffs had failed either to pursue or exhaust their administrative remedies under the FOIA; and (3) the document purportedly requested by the plaintiffs -- a report of investigation -- did not exist. Accordingly, the Commission urged dismissal of the case since the district court lacked jurisdiction over the subject matter of the complaint and the plaintiffs had failed to state a claim upon which relief could be granted. The Commission also moved to strike that portion of the ex parte show cause order that directed the Commission to produce for in camera inspection the "Report of the SECURITIES AND EXCHANGE COMMISSION * * *," on the ground that no such report existed (A. 66-67). The Commission's motion was accompanied by an affidavit from William D. Moran, Administrator of the Commission's New York Regional Office and the staff official in charge of the investigation. His affidavit stated, in part:

"On my own personal knowledge, I unequivocally state that * * * the New York Regional Office [of the Commission] has, at the present time, not completed its investigation in the matter of the City of New York, and no complete report has been written or sent to the Commission in Washington, D.C."

(A. 64.) 18/

Subsequently, on July 26, 1977, the district court heard oral argument of the parties on the order to show cause, as well as on the Commission's motion to dismiss the complaint. A second hearing was held on August 1, 1977, after the parties had submitted additional memoranda of law. After the argument

18/ In an additional affidavit (A. 180-182), Mr. Moran informed the district court that, "[e]ven at the present time, certain aspects of this information gathering process are continuing."

on August 1, the district court entered its in camera inspection order (which is part of the subject of the instant appeal and petition), but left pending the Commission's motion to dismiss for lack of jurisdiction. On August 2, 1977, the district court held oral argument on the Commission's oral motion for reconsideration (A. 330-388), and entered an order reaffirming its order of August 1 in all respects (A. 389). The court also entered declaratory orders concluding (1) that the court had jurisdiction of this action, and (2) that the Commission should be deemed as a matter of law to have acted upon a validly-made FOIA request. Finally, at the end of the hearing, and upon Commission counsel's request for clarification (A. 388), the court denied the Commission's motion to dismiss.

During oral argument, the district judge noted (A. 105) that the plaintiffs "have not followed the [Commission's FOIA] channels at all," and specifically found (A. 278-279) that "there has been no decision made within the SEC itself as to what to do about Mr. Marshall's demand." Indeed, the district court stated that "the fact that it [Mr. Marshall's demand] did not get into the proper channels * * * is primarily the responsibility of the plaintiff * * *," since, as the court indicated, the plaintiffs had not done the necessary research required to present a recognizable request under the FOIA to an agency (A. 280-281). ^{19/} Indeed, as the court noted (A. 105), and the plaintiff himself acknowledged (A. 96), counsel for the plaintiffs had not even bothered to inform himself as to the proper procedure for making a request pursuant to the FOIA.

Similarly, as the court below recognized (A. 144), even if the plaintiffs could be deemed to have made an FOIA request, that request encompassed only "a copy of the SEC Report on the results of its investigation * * *"

^{19/} The lower court also believed that "there was some responsibility on the part of the Commission itself * * *" (id.).

(Compl. ¶27, A. 12). But, the pleadings, sworn affidavits and proffered testimony of the Commission's Director of its Enforcement Division (A. 61, 62, 64, 65, 71, 74, 163, 174, 180-182, 244-245, 254a-255, 336, 338, 366-367, 370-371), 20/ all established, as the district judge expressly concluded, that, at most, all that existed were "portions [of a draft memorandum] prepared by the New York [Regional] office [of the Commission] and so far as it being a Commission report, it certainly was not" (A. 296; see also, A. 329).

Nevertheless, despite the failure of the plaintiffs to make a request in accordance with the FOIA and with the Commission's FOIA rules, and despite the uncontested finding that no exhaustion of remedies had been effected, and despite the fact that the only document specifically, but belatedly, identified by the plaintiffs in the course of the lawsuit did not, in fact, exist, the district court entered a declaratory order on August 2, 1977 (A. 389-390), concluding that the court had "jurisdiction of this matter pursuant to 5 U.S.C. 552."

The district judge indicated that he "had considered dismissing the complaint on the grounds that proper channels were not gone through within the SEC" (A. 320), and "had also considered referring it back to the SEC so the normal appellate process of the SEC could be gone through" (id.; see also A. 380-385). But, he rejected these alternatives because

20/ The Director of the Commission's Division of Enforcement, Stanley Sporkin, informed the court below that he and members of his staff were, at that time, in New York to expedite the completion of the staff's investigation (A. 336). Commission counsel offered to have Mr. Sporkin be sworn, to testify as to the current status of the investigation (A. 365), but the court responded that it would not be necessary for Mr. Sporkin to be sworn (A. 370). Accordingly, Mr. Sporkin advised the court of the status of the Commission's investigation, and his statements were, in essence, unchallenged by the plaintiffs. Mr. Sporkin indicated, among other things, that the staff was primarily occupied in drafting, reviewing, editing, and verifying the factual material selected for inclusion in its memorandum to the Commission (A. 370-371).

"it would probably eventuate in our being back here again" (A. 329, emphasis supplied) and, apparently, because Mr. Marshall "resent[ed] going * * * to the SEC and waiting yet another thirty days or twenty days, as the Act says" (A. 383, emphasis supplied). 21/

Having concluded that no complete report existed, the judge nevertheless went through lengthy hearings, in effect to provide a substitute for a proper FOIA request and the agency's processing of such an FOIA request. Thus, the district court:

(1) redefined the plaintiffs' request to render it a request for draft portions of a staff memorandum, rather than a complete report prepared by the Commission; 22/

(2) initially considered what exemptions might be available with respect to the request, as newly defined; 23/

(3) further refined the request to include not all draft material,

21/ Commission counsel indicated his willingness to inquire of the Commission whether it could process an FOIA request from the plaintiffs in a shorter period of time than is statutorily permitted (A. 380-382). When the plaintiffs objected, however, the district judge rejected Commission counsel's offer (A. 383, 385).

22/ Counsel for the Commission pointed out (A. 152) that the plaintiff Marshall had "come into the courtroom seeking a complete report. There is no complete report." Indeed, Commission counsel advised the district judge (A. 308) that "there is no completed report from * * *" either "the Commission, * * * the Washington staff, * * * [or] the New York staff * * *." The judge, however, replied: "I think he is willing to settle for the portions that have been written" (A. 152). The plaintiffs subsequently adopted this suggestion (A. 155). If it were the case that Mr. Marshall wanted to see "the portions that have been written," as the judge helpfully suggested, he could have made such a request in early May when he was told that the report was not complete.

23/ Thus, at one point, the judge suggested to Commission counsel that Exemption 8 might be applicable (A. 124). Counsel for the Commission replied (A. 124) that he did not "think that the exemption [was] irrelevant," and that the Commission "could rely on it." Of course, since the Commission had not had an opportunity to address the issue, it was at that point impossible for counsel to say either what exemptions the Commission believed might be available or upon what exemptions, if any, the Commission might choose to rely.

but only those portions of a staff memorandum "which have been drafted and submitted to the Administrator or the Associate Administrator of the New York Regional Office;" 24/ and, finally,

(4) ordered the production of the records covered by the newly-formulated "FOIA request" for in camera inspection, to permit the judge to decide whether to release the records.

Beyond the jurisdictional and exhaustion of remedy questions, the district court also focused its attention on the nature of the documents that did exist with respect to the New York City investigation. On the basis of affidavits (A. 64-65, 180-182, 254a-255), the oral representations of Commission counsel (see, e.g., page 16, supra) which the court accepted in lieu of the sworn testimony the Commission had proffered (A. 370), and the in camera submission of the Commission's Formal Order of Investigation (A. 128-129), the district judge concluded (A. 133) that "of course" the Commission's staff's draft reports were predecisional, law enforcement-related documents "involving the decisionmaking process," even the production of which the court acknowledged would disrupt a concededly ongoing investigation (see, e.g., A. 133, 347, 364-365).

And yet, despite the undisputed 25/ showing of the exempt nature of the staff documents upon which the district court's attention ultimately focused, the lower court ordered in camera inspection of raw, preliminary draft work product of the Commission's New York Regional Office staff (A.

24/ A. 329.

25/ The plaintiffs' attempts at disputing the Commission's presentation of probative evidence demonstrating the exempt nature of the materials in its staff's possession were limited to the introduction of certain newspaper clippings and editorials (see, e.g., A. 42, 43, 45, 46, 48, 54, 55, 89, 236).

329). The in camera order was issued not because the district judge was dissatisfied with the Commission's showing, but because he read the FOIA as imposing such an "obligation" on the courts (A. 337, emphasis supplied); indeed, despite the permissive language of the FOIA relating to in camera inspection, 5 U.S.C. 552(a)(4)(B), 26/ the lower court ruled:

"the whole thrust of the Freedom of Information Act, as I read it, is that the Court is to satisfy itself in whatever way it can, and specifically include in-camera inspection, that something is what it is claimed to be" (A. 337).

Accordingly, and in order "to assist the public in making a decision with respect to the various candidates for election" (A. 292-293), the district court held that it was required to order the Commission to produce drafts of its attorneys' work product, compiled in anticipation of potential litigation, for in camera inspection.

REASONS FOR GRANTING THE WRIT

By its orders in this case, the district court has asserted two propositions--(1) that it has jurisdiction over an action seeking access to records under the FOIA without requiring the plaintiff to have requested access to the records from the agency itself, or to exhaust the administrative

26/ 5 U.S.C. 552(a)(4)(B) provides as follows:

"On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

process Congress determined was mandatory; and (2) that it has the ultimate discretion to decide whether to publish, as well as the timing of the publication of, a report of a Commission investigation, and its contents. The Commission believes that it has the responsibility, as an independent agency charged by the Congress with investigating and prosecuting violations of the federal securities laws, to invoke the assistance of this Court to protect its jurisdiction from this unjustified encroachment by the court below.

Based on the teachings of the Supreme Court, the Commission respectfully submits that the orders entered below are appealable. ^{27/} (A detailed discussion of the appealable nature of those orders has been set forth in the Commission's reply to the plaintiffs-appellees' motions to vacate the district court's stay order and to dismiss this appeal, filed with this Court on Friday, August 12, 1977.) But, even if it were assumed, arguendo, that an appeal as of right does not lie, the issuance of writs of mandamus and prohibition are particularly appropriate in this case, where the Commission seeks only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction * * *." Roche v. Evaporated Milk Association, 319 U.S. 21, 26 (1943).

As we discuss below, the district court had no jurisdiction to proceed under the FOIA and it had no other source of jurisdiction. Accordingly, the Commission asserts that a fundamental error pervades the district court's action here, and, as this Court has recently noted, while

"mandamus is not a substitute for an appeal, and
* * * every disputed ruling during a trial should
not be made the subject of a mandamus petition * * *
the relief sought here is more fundamental. The
errors complained of are not errors involving [the]

^{27/} See, e.g., United States v. Nixon, 418 U.S. 683 (1974); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949).

improper exercise of discretion; * * * rather, they concern actions which, petitioner has charged, are entirely outside the permissible bounds of the trial court's discretion, and which exceed the trial court's jurisdiction. Such actions are properly reviewable by writ of mandamus." 28/

By its action, the district court signalled its intention to usurp vital functions committed to the Commission's discretion by Congress. Notwithstanding the Commission's demonstration that any materials that might have been (but were not) requested are exempt under the FOIA, the district court required in camera inspection, to determine whether it should order the release of draft portions of a memorandum currently being prepared by the Commission's staff, in order that the court might "assist the public in making a decision with respect to the various candidates for election" (A. 292-293).

But, Section 21(a) of the Securities Exchange Act commits to the Commission's sole discretion (a) whether to issue any report of its investigation of New York City securities at all, as one enforcement option available to the agency, (b) the timing of the release of such a report, and (c) the contents of any report. Under similar circumstances, this Court has held that, where a "determination is for [the government to make] and not for the courts," mandamus is appropriate in light of the fact that "the court below did not simply abuse its discretion but usurped a power in making a finding which the Congress vested in [the government]." United States v. Carter, 493 F.2d 704, 708 (C.A. 2, 1974).

For the above reasons, coupled with the facts that the enforcement of the district court's order will impose a serious burden on the Commission and gravely interfere with its New York City investigation, a result which the legislative drafters of the FOIA carefully sought to avoid, as well as the fact

28/ International Business Machines Corp. v. Edelstein, 526 F.2d 37, 40 (C.A. 2, 1975).

that the order will have a detrimental impact on all future agency investigations if it is permitted to stand as a precedent in this critical area of agency action, review at this time by this Court would serve "a vital corrective and didactic function." 29/

ARGUMENT

I. THE DISTRICT COURT USURPED AUTHORITY COMMITTED TO THE COMMISSION BY CONGRESS UNDER BOTH THE FREEDOM OF INFORMATION ACT AND THE SECURITIES EXCHANGE ACT.

- A. The District Court Lacked Jurisdiction to Entertain this Action since the Plaintiffs Failed to Pursue or Exhaust the Requirements of the Freedom of Information Act.

In order to obtain access to records under subsection (a)(3) of the FOIA, 5 U.S.C. 552(a)(3), 30/ a person seeking agency documents must satisfy three simple conditions:

- (1) there must be a request for records; 31/
 - (2) the request must reasonably describe such records; 32/ and
 - (3) the request must be made in accordance with the agency's published rules stating the time, place, fees and procedures required for each request. 33/
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29/ Will v. United States, 389 U.S. 90, 107 (1967).

30/ This subsection provides that

"each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."

31/ The Senate Report on the FOIA noted that the "only records which must be made available are those for which a request has been made." S. Rep. No. 813, 89th Cong., 1st Sess. at 2 (1965). (emphasis supplied).

32/ 5 U.S.C. 552(a)(3)(A).

33/ 5 U.S.C. 552(a)(3)(B). The Commission's rules under the FOIA are set forth at 17 CFR 200.80, and are reprinted in the statutory appendix to this brief, pp. 1c, et seq., infra.

As we have seen, supra at pages 10-12, none of these three conditions was satisfied by the plaintiffs herein. 34/

As a means of providing the public with access to agency records, Congress enacted the FOIA, carefully establishing a statutory scheme which embodies a two-step process. At the initial level, a request under the FOIA must be considered by an agency, followed, only when necessary, by judicial review of the agency's determination in the district courts. Attorney General, Memorandum on the Public Information Section of the Administrative Procedure Act 78 (1967).

Thus, the FOIA provides that any person seeking access to agency records must make a request to that agency which reasonably describes such records and which is made pursuant to the agency's published rules and procedures. Subsection (a)(6) of the FOIA, 5 U.S.C. 552(a)(6), provides that the agency shall make an initial determination with respect to the availability of the information within ten working days after its receipt of a request, and further provides for an appeal of an adverse decision to the head of the agency within twenty working days after receipt.

In addition to the plain language of the Act, its legislative history indicates that the initial responsibility for determining the availability of information requested under the Act clearly falls upon the federal agencies subject to its terms. 35/ It is only after the exhaustion of the carefully drawn administrative procedures that a requesting party may invoke the

34/- The Commission does not stand on formalistic compliance with the procedural requirements for making a request under the FOIA, so long as, unlike the case here, the Commission can recognize that a request for specific records has been made, however inartfully. Here, the communications received from sophisticated counsel could not reasonably be construed as a request under the Act for specific documents.

35/ See S. Rep. No. 93-854, 93d Cong., 2d Sess. 3, 5-6 (1974); H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 4, 6 (1974).

jurisdiction of a district court. 36/

Before a district court may assert jurisdiction under the FOIA to order an agency to produce withheld documents, and before a court can undertake a de novo review of the agency's decisions, and before an agency can attempt to meet the burden of sustaining its action, there must have been some action by the agency giving rise to the need for judicial review. 37/ As this Court has noted, Congress devised a scheme embodied in the FOIA to "allow agencies the opportunity to review denials of requests and to correct their errors prior to allowing judicial review." Diapulse Corp. of America v. Food and Drug Administration, 500 F.2d 75, 78 (C.A. 2, 1974) (emphasis supplied).

Thus, the plaintiffs must satisfy the conditions which Congress has imposed on any person seeking access to agency records in order to invoke the assistance of a district court under the FOIA. Without such a showing, which

36/ See, e.g., Tuchinsky v. Selective Service System, 418 F. 2d 155, 158 (C.A. 7, 1969); Morpurgo v. Board of Higher Education, 423 F. Supp. 704, 714 n.26 (S.D. N.Y., 1976); Satra Belarus, Inc. v. National Labor Relations Board, 409 F. Supp. 271, 273 (E.D. Wisc., 1976); Grisson v. National Labor Relations Board, 364 F. Supp. 1151 (M.D. La., 1973). Cf. Commercial Envelope Manufacturing Co. v. Securities and Exchange Commission, 450 F.2d 342 (C.A. 2, 1971).

37/ It is undoubtedly for this reason that the District Court for the District of Columbia Circuit has stated: "Although plaintiffs claim that the Freedom of Information Act * * * confers jurisdiction on this Court, that Act requires that plaintiffs make specific requests in accord with published agency procedures." Aviation Consumer Action Project v. Civil Aeronautics Board, 370 F. Supp. 945, 947 (D. D.C.) (emphasis supplied) (citations omitted), affirmed, 480 F.2d 1195 (C.A. D.C., 1972). See also Jaffess v. Secretary, Dept. of Health, Education and Welfare, 393 F. Supp. 626, 629 (S.D. N.Y., 1975). Accord, Cuff v. Levi, 75-2 U.S.T.C. ¶9670 (W.D. Pa., 1975); Etheridge v. Internal Revenue Service, 74-1 U.S.T.C. ¶9354 (D. Ga., 1974).

Indeed, subsection (a)(4)(B) of the FOIA, 5, U.S.C. 552 (a)(4)(B), the provision pursuant to which the court below entered its order requiring production (A. 329), by its very terms contemplates that, before a district court can engage in an in camera review, a complainant must have requested, and have been denied access to, specified materials in accordance with the provisions of subsection (a)(6).

was absent in the court below, the district court lacked jurisdiction to entertain any aspect of the action, including the issuance of its August 1 order compelling the submission of documents for in camera inspection. 38/

Compliance with these requirements as a predicate for the district court's exercise of jurisdiction is not a hollow technicality; rather, it serves as an integral part of the Congressional scheme designed to promote the disclosure of information in the possession of the government. By seeking to inject the district court prematurely into this process, the plaintiffs have denied the Commission the opportunity to consider a request for records under the FOIA (had they seen fit to make such a request), and to exercise its judgment and discretion in determining whether to release information under the FOIA. 39/

38/ See, e.g., Morpurgo v. Board of Higher Education, 423 F. Supp. 704, 714 n.26 (S.D. N.Y., 1976); Satra Belarus, Inc. v. National Labor Relations Board, 409 F. Supp. 271, 273 (E.D. Wisc., 1976); Jaffess v. Secretary, Dept. of Health, Education and Welfare, 393 F. Supp. 626, 629 (S.D. N.Y., 1975); Aviation Consumer Action Project v. Civil Aeronautics Board, 370 F. Supp. 945, 947 (D. D.C.), affirmed, 480 F.2d 1195 (C.A. D.C., 1972). See United States v. United Mine Workers of America, 330 U.S. 258, 293-295 (1947).

The district court recognized the nature of the showing required of the plaintiffs. To Mr. Marshall's statement that "I have no burden" in this action, the court replied, "you do have some burden. Don't you have the burden of showing that you have made a request for information that falls within the provisions of the Freedom of Information Act?" (A. 105.) Although counsel for the plaintiffs begrudgingly acknowledged this burden (A. 105), the district court expressly determined (A. 389) not to require the plaintiffs to satisfy it.

39/ And, it should be noted that, even in the case of materials which are properly exempted from disclosure, the Commission may, after an opportunity to examine the relevant considerations, publicly disclose the information. See 17 CFR 200.80(d)(6)(iv). Indeed, the Commission has in the past exercised its discretion in this regard. See, e.g., Requests of Jerry Landauer and John Barry, 12 SEC Docket 278 (1977). A district court, on the other hand, lacks jurisdiction under the FOIA to order the release of exempt records, since the Act, by its terms, "does not apply" to such records. 5 U.S.C. 552(b). See, e.g., Charles River Park "A", Inc. v. Department of Housing and Urban Development, 519 F.2d 935 (C.A. D.C., 1975).

But, in the instant case, the plaintiffs have made no request for specific records in conformance with the requirements of the FOIA, or otherwise. Rather, in a cavalier fashion, and in apparent response to the schedule pertaining to Mr. Harnett's campaign for political office and his desire to obtain maximum publicity for that campaign (A. 1), the plaintiffs have elected to invoke the assistance of the district court in their efforts to obtain certain Commission investigatory records and certain staff draft memoranda, without first having attempted even to pursue, much less exhaust, the administrative remedies available to them.

Where no attempt has been made to permit the agency to make its initial determination of the availability of the material, the district court cannot, and should not, be substituted as the original forum for the administrative processing and determination of a request. Indeed, for the district court to take upon itself the responsibility of initially determining whether records should be made available under the FOIA is tantamount to a judicial usurpation of an administrative function which has been exclusively committed by the Congress to the Commission to exercise in the first instance.

A necessary corollary to the policy of affording the agency a chance to exercise its discretion in the first instance is that the courts should not be saddled with the extra burden of administering the bulk of requests made pursuant to the FOIA. As noted in the House Report on the FOIA, "the court review procedure would be expected to serve as an influence against the initial wrongful withholding instead of adding substantially to crowded court dockets." 40/

Moreover, even if the correspondence, upon which the plaintiffs purport to rely, could be said to have amounted to a formal FOIA request, it would be

40/ H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966).

insufficient because the FOIA does not apply to requests for nonexistent records and does not require an agency to create any record in response to a request. Nichols v. United States, 325 F. Supp. 130 (D. Kan., 1971), affirmed, 460 F.2d 671 (C.A. 10), certiorari denied, 409 U.S. 966 (1972). ^{41/} As the Supreme Court has stated in an analogous situation, the FOIA "does not compel agencies to write opinions in cases in which they would not otherwise be required to do so." National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 161-162 (1975).

B. Section 21(a) of the Securities Exchange Act Deprives a District Court of Jurisdiction to Supervise an Active Commission Investigation.

The court below found, and the plaintiffs now apparently recognize, that a report of the Commission's investigation of New York City does not exist. Nonetheless, the district court determined to examine selected materials in an active investigatory file, in an effort to determine whether it should make such materials publicly available.

As we have seen, in establishing the Commission, the Congress "provided [it] with an arsenal of flexible enforcement powers." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976). Among the tools in this "arsenal" is the Commission's discretionary power, pursuant to Section 21(a) of the Securities Exchange Act, to "make such investigation as it deems

^{41/} The plaintiffs, during oral argument in the court below, made disingenuous claims that a completed Commission "report" might exist (A. 142). But, aside from the representations of the plaintiffs' counsel in court, it is clear that the plaintiffs understood from the beginning that there was no such report. Thus, as noted above (see pp. 11-12), in a mailgram sent to the President on May 5, 1977, Mr. Harnett asked the President to "direct the Chairman of the Securities & Exchange Commission to order the completion and release of the report no later than June 1, 1977" (A. 22, emphasis supplied). If the plaintiffs had believed that a "report" had been completed, there would, of course, have been no need to request its "completion."

necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title, the rules or regulations thereunder * * *," and to decide whether, and when, to issue a public report of its investigations. 42/ See, e.g., Schmidt v. United States, 198 F.2d 32 (C.A. 7), certiorari denied, 344 U.S. 896 (1952); Woolley v. United States, 97 F.2d 258 (C.A. 9), certiorari denied, 305 U.S. 614 (1938).

The plaintiffs do not contest the authority of the Commission to commence its investigation. Rather, they seek, through a purported FOIA lawsuit, the public dissemination of the results of the investigation before that investigation has been completed and even before all the evidence has been compiled. The plaintiffs press the validity of their lawsuit, arguing that once the New York City investigation is completed the Commission may exercise one or more of its options under Section 21(a), including, inter alia, "its discretion * * * [to] publish information concerning any * * * violations."

Although it is certainly possible, in light of the intense public and Congressional interest generated by the New York City situation, that a final public report of its investigation in the matter of the City of New York will be issued by the Commission, all matters relating to the issuance of such a report, including the decision whether to issue a report and a decision with respect to its contents and the timing of its release, are expressly committed by Congressional mandate to the Commission's " * * * absolute discretion as to exercise and exclusive judgment as to field and scope." 43/ It is not within the power of a district

42/ In addition to the investigatory power discussed above, Section 21(a) further confers on the Commission the discretionary power "to publicize information concerning any such violations, and to investigate any facts, conditions, practices or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title * * *."

43/ Dyer v. Securities and Exchange Commission, 291 F.2d 774, 781 (C.A. 8, 1961). See also, Kukatash Mining Corp. v. Securities and Exchange Commission, 309 F.2d 647 (C.A. D.C., 1962); Schmidt v. United States, 198 F.2d 32 (C.A. 7), certiorari denied, 344 U.S. 896 (1952).

court to compel the Commission to disclose to the public information concerning possible violations of the securities laws. "[I]t must rest in the sound discretion of the agency created by the Congress, and not with the courts, to determine when investigations are to be conducted [either] open or closed * * *." Securities and Exchange Commission v. Harrison, 80 F. Supp. 226, 229 (D. D.C., 1948). 44/ In the absence of a contrary indication in the statute, it is for the agency, not the courts, "to determine * * * how the investigation [is] to be conducted and regulated." Bowles v. Baer, 142 F.2d 787, 789 (C.A. 7, 1944). And, notwithstanding the concerns of the plaintiffs and the court below to assist the voters of the City of New York, nothing in the FOIA or otherwise entrusts the decision whether, or when, to make the documents obtained, or staff memoranda compiled, during the course of a continuing law enforcement investigation public. 45/ As cogently stated by the court of appeals in Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 318-320 (C.A. 3, 1944)(en banc), certiorari denied, 325 U.S. 867 (1945):

"The fundamental proposition which probably no one would dispute, is that a court's power is judicial only, not administrative nor investigative. * * * We do not think this view imposes unduly restrictive limitations upon courts. The judicial power is limited to deciding controversies. * * * No doubt a great deal goes on in the world which ought not to go on. If courts had general investigatory powers, they might discover some of these things and possibly right them. Whether they would do as well in this respect as officers or bodies expressly set up for that purpose may be doubted, but until the concept of judicial power is widened to something quite different from what it now is courts will better serve their public function

44/ - Accord, e.g., Securities and Exchange Commission v. Republic National Life Insurance Company, 383 F. Supp. 436 (S.D. N.Y., 1974); Woolley v. United States, 97 F.2d 258, 262 (C.A. 9), certiorari denied, 305 U.S. 614 (1938); Schmidt v. United States, 198 F.2d 32, 36 (C.A. 7), certiorari denied, 344 U.S. 896 (1952); Kukatash Mining Corp. v. Securities and Exchange Commission, 309 F.2d 647, 650-651 (C.A. D.C., 1962).

45/ We recognize, and concede, that once there ceases to exist a continuing prospect of law enforcement proceedings, a different question is presented.

in limiting themselves to the controversies presented by parties in litigation." 46/

And yet, despite the discretion committed to the Commission by Section 21(a), the district court ordered the production of portions of the draft report of-investigation for its in camera inspection, for the purpose of determining which, if any, portions of the staff's draft memoranda should be made public at this time. We submit that it was without the power to do so.

The avowed goal of the plaintiffs' quest, immediate public release of the draft staff memoranda, in whatever stage of completion, flies in the face of the Commission's responsibility and discretion for its investigative efforts. 47/ In this regard, the words of the Court of Appeals for the First Circuit are particularly apt: "it is not the court's role to intrude into the investigative agency's functions. Congress committed securities investigations to the SEC, not the courts." Securities and Exchange Commission v. Howatt, 525 F.2d 226, 229 (C.A. 1, 1975). And, as this Court has stated, "the Commission must be free without undue interference or delay to conduct [its] investigation * * *." Securities and Exchange Commission v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1053 (C.A. 2, 1973).

This Court should not lose sight of the fact that, under the color

46/ Accord, e.g., Appeal of United States Securities and Exchange Commission, 226 F.2d 501, 519-520 (C.A. 6, 1955); Securities and Exchange Commission v. Harrison, 80 F. Supp. 226, 233 (D. D.C., 1948).

47/ The plaintiffs do not intend to stop at even this destructive point. Rather, their apparent eventual goal is to compel the Commission to finish its report by a date certain. See A. 101-122, 305-306. The district judge seemed inclined to assist them in this pursuit (A. 292-293). That alone indicates the dangers of allowing premature interference with Commission investigations--to set a time limit for such a complex and voluminous document as a New York City investigative report would even more deeply involve the district court in the administration of the federal securities laws and could, moreover, invite a deficient, inadequate and ill-informed document.

of a purported FOIA request -- a request that, in fact, was never made -- the district court has divested the Commission of a law enforcement-related judgment which the Congress has explicitly reserved for the Commission. But, as noted in Securities and Exchange Commission v. Republic National Life Insurance Company, 383 F. Supp. 436, 438 (S.D. N.Y., 1974), "[i]f the agency or officer is acting within the limits of the discretion conferred by Congress, then there is no jurisdiction." The Freedom of Information Act "does not grant the courts general supervisory power to control the performance" of agencies subject to the Act, 48/ however, and judicial intervention into the timing and content of the release of a report of the Commission's investigation into New York City securities cannot be sustained under any legal theory. Accordingly, since the lower court has no discretion to release this material at this time, in camera inspection serves no valid purpose, and the lower court's order requiring inspection was improper.

C. Under the Circumstances of this Case, the Court Below
Had No Jurisdiction to Order In Camera Inspection.

To a large degree, the district court's order requiring in camera inspection appears to have rested on the court's mistaken belief that it is required, as a matter of law, to inspect documents in camera in any, and every, suit allegedly brought pursuant to the FOIA. (A. 337, 347, 353). Such a position is, however, wholly unfounded. The legislative history of the FOIA clearly indicates that in camera inspection should be used sparingly, and only when the courts have not been able to employ other methods of ascertaining the applicability of claimed exemptions, including sworn affidavits of agency

48/ Church of Scientology v. United States Department of Justice, 410 F. Supp. 1297, 1301 (C.D. Cal., 1976).

officials. 49/ Moreover, as discussed below, the courts have held that in camera inspection is not to be employed to transfer to the courts "administrative responsibility" for implementing the FOIA; 50/ moreover, in camera should not be used except in exceptional circumstances in the sensitive area of ongoing law enforcement investigations. 51/

We submit that the district court order requiring the submission of unreviewed draft staff memoranda for in camera inspection was an improper assertion of the lower court's jurisdiction which warrants reversal on appeal, or the issuance of writs of mandamus and prohibition, because:

(1) since, as we have demonstrated, no FOIA request was ever made by the plaintiffs or considered by the agency, the court did not have jurisdiction over the claim asserted by the plaintiffs and therefore lacked jurisdiction to order the in camera inspection of any documents; and

(2) in camera inspection is a disruptive intrusion into the Commission's New York City investigation, an intrusion which, as the courts have recognized, is to be avoided where possible, and here it plainly was possible to do so.

.....

49/ See, e.g., H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 9 (Conf. Rep., 1974).

For example, in Open America v. Watergate Special Prosecution Force, 597 F.2d 605 (C.A. D.C., 1976), the court of appeals indicated that even when an agency clearly had not complied with the FOIA's time deadlines for responding to requests — the jurisdictional predicate for court review under the Act — the courts were not to substitute their judgment for that of the agency. Rather, the appropriate remedy is to remand for expedited agency consideration of the requests. As this case indicates, the administrative process is designed, and should be used, to define, to the fullest extent possible, what controversy, if any, there is between the agency and the person requesting access to the agency's records.

50/ Morton-Norwick Products, Inc. v. Mathews, 415 F. Supp. 78, 83 (D. D.C., 1976); Weissman v. Central Intelligence Agency, ___ F.2d ___, 40 Ad.L. 2d 829 (C.A. D.C., 1977).

51/ New England Medical Center Hospital v. National Labor Relations Board, 548 F.2d 377 (C.A. 1, 1976); Roger J. Au & Son, Inc. v. National Labor Relations Board, 538 F.2d 80 (C.A. 3, 1976).

Here, compelling circumstances militated against the employment of in camera inspection. Court intervention at this critical stage of the investigation can only serve to jeopardize the Commission's ability to complete its investigation promptly, as the court below specifically acknowledged. 52/ Even under less critical circumstances than those existing here, the production of records for in camera inspection has been recognized as unduly burdensome. 53/

Although the plaintiffs originally requested a copy of a Commission "report" (A. 20), it was found by the court below that "there is no complete report; that there is at most a draft report which is not finished, plus underlying documents" (A. 305). In recognition of the importance to the public of the Commission's investigation, the Commission's staff has taken extraordinary steps to complete its work as promptly as possible. A large number of the members of the Commission's headquarters staff, including many of its senior personnel, have been dispatched to New York City to assist the New York Regional Office staff already working

52/ A. 347. The court noted that "the extent to which there is Court oversight or Court review does interfere with the ability of the SEC to perform its law enforcement functions with dispatch." But, in fact, when Congress amended Exemption 7, it recognized the excessive and improper administrative burdens that could be placed on an agency (and the courts) by acceptance of the district court's interpretation of the FOIA. Recognizing that some parts of the new law were "ambiguous," Senator Hart, the principal author of the amended Exemption 7, stated: "If the requests prove unnecessarily burdensome, * * * the agencies will find a sympathetic ear in the Courts when the time comes for interpreting those sections." 120 Cong. Rec. S19812. Thus, the Court of Appeals for the Tenth Circuit reversed a district court that had held that Exemption 7(A) requires a showing of the impact of disclosure in the case of each portion of records relevant to an active enforcement proceeding, finding it "impossible to believe that Congress intended to call upon the federal courts to perform this task." Climax Molybdenum Co. v. National Labor Relations Board, 539 F.2d 63, 65 (C.A. 10, 1976).

53/ See, e.g., Morton-Norwich Products, Inc. v. Mathews, 415 F. Supp. 78 (D. D.C., 1976).

on the investigation. Many of these staff members are working virtually around the clock to finish this work. (A. 430).

As has been true of the need to conduct the Commission's defense of this frivolous litigation, compliance with the district court's in camera inspection order would result in a very serious disruption of the ongoing investigatory process. The diversion of valuable and experienced persons from their present activities, both to comply with the practical problems of duplicating and assembling the thousands of pages of materials encompassed within the district court's order, and to guide the court below in its review of those materials, can only harm this investigation (A. 181, 335, 351, 355). The Commission is acutely aware of the public interest in its investigation. After the completion of a staff memorandum, and after consideration of it by the Commission itself, the memorandum, or portions of it, may in fact be released to the public. But, that process has already been significantly interrupted by this unfounded litigation, and to hamper it further by the needless imposition of in camera inspection for which there is neither warrant nor jurisdiction will only serve to jeopardize the public's interest in a complete and accurate investigation. This Court should forbid this further imposition on the Commission, and permit it to complete its ongoing work as expeditiously as possible.

II. THERE WAS NEITHER JURISDICTION NOR JUSTIFICATION FOR THE DISTRICT COURT'S ORDER REQUIRING IN CAMERA INSPECTION OF THE DRAFT PORTIONS OF A WHOLLY-PRIVILEGED STAFF MEMORANDUM.

Necessarily, implicit in the district court's order for in camera inspection of the Commission's documents is the supposition that, upon review of the materials, the court could legally order the disclosure of at least a portion of the records in dispute. Indeed, notions of judicial economy dictate that the courts undertake in camera inspection only when

presented with a cognizable question regarding the availability of the materials being sought. We submit that those circumstances are not present here.

The district court has acknowledged that, based upon the sworn affidavits and representations submitted by senior Commission officials, the draft memoranda of the Commission's staff relate solely to a current investigation being conducted for law enforcement purposes which is a deliberative tool that the Commission will employ in making law enforcement decisions with respect to its New York City investigation (A. 133). This is the extent of the burden the Commission is required to carry to demonstrate the applicability of both Exemptions 5 and 7(A) of the FOIA. 54/ Consequently, these materials are well within the scope of the FOIA's exemptive provisions. As we discuss more fully below, these factors, coupled with the detriment which will inure to the public by the unwarranted judicial intrusion into the Commission's ongoing investigative process, renders improper the district court's order requiring certain records to be produced for in camera examination.

- A. The Draft Portions of the Report of Investigation are Exempt Pursuant to Exemption 7(A)

In a seminal case interpreting amended FOIA Exemption 7, this

54/ The FOIA provides that the Act

"does not apply to matters that are—

* * *

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; [or]

* * *

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings

* * *."

Court noted that, until "the investigation is completed and all reasonably foreseeable administrative and judicial proceedings concluded," the production of investigatory records may not be compelled pursuant to the FOIA. Title Guarantee Co. v. National Labor Relations Board, 534 F.2d 484, 490 (C.A. 2), certiorari denied, 429 U.S. 834 (1976). This decision has since been followed by seven other courts of appeal. ^{55/} These are compelling precedents.

The August 1, 1977, order comes at a critical moment in the Commission's ongoing investigation. After 18 months of intensive investigation, the Commission's staff is currently attempting to complete a memorandum describing its investigation which will, in turn, be the foundation for a Commission determination as to what law enforcement action, if any, may be appropriate. The Act and its legislative history make clear that the FOIA is not to be misused by persons so as to prejudice an enforcement proceeding before it can be brought. Thus, Senator Hart, in introducing the 1974 Amendments to the FOIA, stated:

"[The exemption for investigatory records] would apply also where the agency could show that disclosure of the information would substantially harm such proceedings

^{55/} New England Medical Center Hospital v. National Labor Relations Board, 548 F.2d 377 (C.A. 1, 1976); Roger J. Au & Son, Inc. v. National Labor Relations Board, 538 F.2d 80 (C.A. 3, 1976); Goodfriend Western Corp. v. Fuchs, 535 F.2d 145 (C.A. 1), certiorari denied, 429 U.S. 895 (1976); Climax Molybdenum Co. v. National Labor Relations Board, 539 F.2d 63 (C.A. 10, 1976); Harvey's Wagon Wheel, Inc. v. National Labor Relations Board, 550 F.2d 1139 (C.A. 9, 1976); National Labor Relations Board v. Hardeman Garment Corp., Nos. 76-1392 and 76-1393 (C.A. 6, June 22, 1977); Abrahamson Chrysler-Plymouth, Inc. v. National Labor Relations Board, No. 77-1038 (C.A. 7, July 27, 1977); Deering Milliken, Inc. v. National Labor Relations Board, 548 F.2d 1131 (C.A. 4, 1977).

by impeding any necessary investigation before the proceeding" (120 Cong. Rec. 17033). 56/

The legislative history of the original FOIA is replete with similar references to the need to protect the confidentiality of open investigatory files.

This concern for the protection of open investigatory files is reflected in the applicable case law; this Court, and every appellate other court, that has considered the issue, have consistently sheltered records in such files from premature disclosure. 57/ The justification for this policy was expressed by the Court of Appeals for the First Circuit in New England Medical Center Hospital v. National Labor Relations Board, 548 F. 2d 377 (1976). In that case, the court held that records in an agency's open investigatory file were exempt under the the seventh exemption 58/ on the ground that premature release would interfere with enforcement pro-

56/ See, e.g., H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

When the Act was amended in 1974, Congress was careful to indicate that the policy of protecting active investigations and enforcement proceedings was to be maintained. As Senator Hart stated: "Then as now we recognized the need for law enforcement agencies to be able to keep their records and files confidential where a disclosure would interfere with any one of a number of specific interests * * *." One of these interests was the need to protect "prospective law enforcement proceedings" from the harm that would result from "the premature release of evidence or information * * *." 120 Cong. Rec. S9329-9330.

57/ See, e.g., Title Guarantee Co. v. National Labor Relations Board, supra, 534 F.2d 484 (C.A. 2, 1976), certiorari denied, 429 U.S. 834 (1976) and the cases cited in n. 55, supra.

58/ The court there stated (548 F.2d at 382):

"There is solid evidence in the legislative history that the sponsors of the 1974 Amendments acknowledged the right of an investigative agency to avoid the possible harm to a prospective law enforcement proceeding that might occur through 'premature release of evidence or information not in the possession of known or potential defendants.' 120 Cong. Rec. 17033 (remarks of Sen. Hart)."

ceedings by "threaten[ing] the agency's ability to prosecute cases with dispatch." 59/

This Court had previously expressed the same view in Title Guarantee Co. v. National Labor Relations Board, 534 F.2d 484, 491 (C.A. 2), certiorari denied, 429 U.S. 834 (1976). There, the Court agreed with the Labor Board that a source of interference stemming from the premature disclosure of investigatory records would be the opportunity that would thereby be afforded suspected violators to "frustrate the proceedings or construct defenses which would permit violations to go unremedied."

Significantly, in the New England Medical Center case, supra, the court recognized what the court below failed to perceive--that this "threat" to an agency's ability to enforce the law arose from the "specter of the involvement of the district court" (id. at 384) in pending enforcement proceedings resulting from the untimely institution of an FOIA lawsuit. Thus, in a statement of the law directly applicable to the circumstances of this case, the court held (id. at 383):

"Exemption 7(A) applies whenever disclosure would 'interfere' with an enforcement proceeding, and it is difficult to conceive of a greater interference than one which would involve the courts in arbitrating the

59/ Cf., the observation of the court in this action below that "the extent to which there is Court oversight or Court review does interfere with the ability of the SEC to perform its law enforcement functions with dispatch" (A. 347).

Unfortunately, the district court nevertheless ordered the in camera production of the draft portions of the staff's memorandum because it was of the view that Congress "anticipated that this was the case when it passed the Freedom of Information Act." But, as the words of Exemption 7(A) show, the Congressional intent was to preclude such "interference" to law enforcement proceedings; moreover, the Congress, as we have seen, supra, n.52, anticipated that the courts would shield the agencies from the undue disruption that could be caused by those who seek, as do the plaintiffs herein, to abuse the FOIA and use it for a purpose for which it was never intended.

[agency's] control of what documents to retain and what documents to surrender immediately prior to an enforcement proceeding."

Finally, noting the need to balance the interests of public disclosure as-against the need for the government to protect its legitimate enforcement interests, the court held that in camera inspection, during the relatively short period of time that an investigation or enforcement proceedings was pending, was inappropriate, stating (id. at 385):

"While the burden on the agency of producing documents for in camera review might well not sustain a claim to a permanent exemption, the FOIA is sufficiently flexible to accommodate the agency's interest in swift and effective enforcement proceedings by allowing it to withhold certain information temporarily without close judicial oversight." 60/

In a recent FOIA appeal, the Court of Appeals for the District of Columbia Circuit recognized and emphasized the "reluctance of Congress and the courts to require in camera inspection" — a reluctance that that court held "well founded" in view of the "burdensome" effects of this procedure. Weissman v. Central Intelligence Agency, ___ F. 2d ___, 40 Ad. L. 2d 829, 835 (C.A. D.C., 1977).

"In every FOIA case," the court noted, there will be some colorable justification for requiring in camera inspection, such as the possibility that the government has submitted an untruthful affidavit, or that some non-exempt material was contained in records for which an exemption was asserted. Id. at 835-836. But, in camera inspection in any but the most unusual cases

"is clearly not what Congress intended, nor what this court has found to be necessary. * * * Neither the legislative history, nor court decisions, have indicated that it was appropriate for the district courts to undertake a line-by-line

60/ In Roger J. Au v. National Labor Relations Board, supra, 538 F.2d at 82-83, the Court of Appeals for the Third Circuit, in concurring in this Court's decision in Title Guarantee, supra, also held that in camera inspection of the disputed material was unnecessary. As a leading text on the FOIA has observed, this was a conclusion that was "implied" in this Court's opinion in Title Guarantee. 2 Mezones, Administrative Law, §10.08[4] at p. 10-210 n.77 (1977).

analysis of agency records in each case. This court has noted the difficulty of such a task, and held that such an investment of judicial energy is not justified, or even permissible. Vaughan v. Rosen [484 F. 2d 820,] 825."

Id. at 835-836.

In yet another FOIA case, Morton-Norwick Products, Inc. v. Mathews, 415 F. Supp. 78, 82 (D. D.C., 1976), the plaintiffs urged in camera inspection of documents, like the plaintiffs herein, because "courts are to be trusted to be impartial and * * * review by a court is more comforting than review by representatives of the agency resisting disclosure." But, the court correctly rejected these contentions and denied in camera inspection, explaining:

"There is nothing in this case to suggest that the agency has not been forthright or responsible. The Freedom of Information Act must proceed in an atmosphere of confidence in government. It is a profound mistake to transfer administrative responsibility to judges on the theory that persons employed by the Executive branch are not honest or lack judgment. The effort to do this through the in camera process is misplaced."

415 F. Supp. at 83 (emphasis supplied). The efforts of the plaintiffs herein are equally misguided; and in the circumstances of this case, involving a matter much more sensitive than anything at stake in Morton-Norwick, the orders entered by the district judge were a most "profound mistake" which we ask this Court to undo.

The court below indicated that the fact that most of the reported cases construing Exemption 7(A) have involved the National Labor Relations Board somehow precluded their applicability to the Commission (A. 313). No basis was articulated for this view, and indeed, none is readily apparent. The FOIA itself applies equally to all government agencies within its purview, and no special treatment is accorded by that Act to any single agency. This Court stated in Title Guarantee that it was "unnecessary to make the broad determination that any investigative information retained in connection with a pending enforcement proceeding is per se

nondiscloseable," 534 F.2d at 491, and we do not believe it is necessary to reach that issue in this case, either. Here, the sensitivity of the Commission's investigation in the matter of New York City and, particularly, the key role of the particular document sought herein, makes this an even stronger case for nondisclosure than the routine Labor Board administrative proceedings which the courts have unanimously afforded complete and unqualified protection. 61/ In arguing against premature disclosure in Title Guarantee, the Labor Board cited three types of "interference" which could result to its proceeding:

"first, suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; second, employees who are interviewed may be reluctant, for fear of incurring employer displeasure, to have it known they have given information, * * * or union officials might not want to volunteer information for fear of compromising the union's position in negotiations, and, third, because these affidavits constitute attorney "work product," revealing investigative and prosecutorial strategy." 62/

Each of these factors is equally present here, if not more so. If the draft staff memoranda currently being prepared are published, suspected violators of the federal securities laws will learn the nature of the Commission's case in advance and will thereby be enabled to take steps to frustrate any resulting proceedings or "construct defenses which would permit violations to go unremedied."

61/ In New England Medical Center, supra, the court protected against disclosure not only the contents of the specific investigatory file which were directly involved in the pending proceedings, but a number of additional files which had been officially closed by the Labor Board but which were, nevertheless, "fully relevant" to those proceedings. 548 F.2d at 385. This is, we submit, an accurate statement of the test for the applicability of Exemption 7(A).

62/ 534 F. 2d 491. This Court agreed with the Board that "interference with the [Board's] proceedings could well result in the first two ways suggested * * *," and therefore found it unnecessary to consider the third type of interference cited.

And, particularly in view of the fact that the Commission's fact-finding process is still going on, the premature disclosure of what the Commission has to date learned from various investigative sources could well dry up those and additional sources. Finally, it would seem too plain for further explication that a draft staff memorandum reporting on the staff's investigation, and designed to assist the Commission in determining whether to institute law enforcement proceedings, is the work product of the Commission's attorneys, the disclosure of which would reveal investigative and prosecutorial strategy.

In Title Guarantee, supra, this Court took note of the "large body of law" with respect to discovery in Labor Board proceedings, and concluded:

"We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to * * * the National Labor Relations Act * * * or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings."

534 F.2d 491-492. In this regard, it is important to note that disclosure of a staff memorandum report of investigation, at any time prior to the institution of, or during the pendency of, Commission enforcement proceedings, and particularly so prior to consideration of the memorandum by the Commission itself, and even prior to its completion, would have an even more devastating effect on the discovery rules applicable in Commission enforcement proceedings: 63/ Many courts have held that internal memoranda, such as the draft

63/ In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Securities and Exchange Commission, 39 AdL. 2d 254 (D. D.C., 1976), the District Court for the District of Columbia applied the rationale of the FOIA cases involving the National Labor Relations Board to a Commission administrative proceeding. In the FOIA suit, the plaintiff sought to have an administrative hearing in which it was a respondent stayed until claims it asserted in the FOIA action were resolved. However, the court declined to order the Commission to produce documents com-

memorandum of a staff investigation involved here, are privileged from discovery, 64/ and this rule has been applied in the context of Commission enforcement proceedings. 65/ Congress did not intend, by means of a "back-door" amendment to the FOIA, to change the discovery rules applicable to Commission proceedings, any more than it intended to modify the rules applicable to Labor Board administrative proceedings in such a manner. 66/

B. The Draft Reports of Investigation are also Exempt Pursuant to Exemption 5.

A staff memorandum describing a law enforcement investigation is also an intra-agency memorandum which qualifies in its entirety for the protection afforded such records by Exemption 5. See, e.g., Brockway v. Department of the Air Force, 518 F. 2d 1184 (C.A. 8, 1975); Kent Corp. v. National Labor Relations Board, 530 F. 2d 612 (C.A. 5, 1976); Safeway Stores, Inc. v. Federal Trade Commission, 428 F. Supp. 346 (D. D.C., 1977). In this regard,

63/ (footnote continued)

filed by the staff during its investigation because there was a "substantial likelihood" that such release "may interfere with the SEC's enforcement efforts." Although the Commission's staff had

"already completed its case in chief * * *, the disclosure of the documents requested could interfere with the SEC's cross-examination of defense witnesses and its rebuttal case. Disclosure could also result in 'tailoring' of testimony. The legislative history of Exemption 7(A) indicates that such disclosure is not warranted in these circumstances."

39 AdL. 2d at 257 (summarized at [1975-76] CCH Fed. Sec. L. Rep. ¶95,566).

64/ See, e.g., Kaiser Aluminum & Chemical Corp. v. United States, 141 Ct. Cl. 38, 157 F. Supp. 939 (1958).

65/ Securities and Exchange Commission v. National Student Marketing Corp., 68 F.R.D. 157 (D. D.C., 1975); Securities and Exchange Commission v. Aldred Investment Trust, 224 F. Supp. 626, 627 (S.D. N.Y., 1963); Merrill Lynch, Pierce, Fenner & Smith v. Securities and Exchange Commission, supra.

66/ Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Securities and Exchange Commission, supra.

it is important to distinguish raw investigative materials, such as the transcripts of testimony or documents obtained from third parties pursuant to an administrative subpoena, from a staff memorandum of investigation: the former is the evidence collected in the course of the Commission's investigation—the "facts." The latter is the staff's selection, compilation, analysis, distillation and discussion of the relevant facts—those facts that, in the opinion of the authors of the memorandum, tend to show the presence or absence of violations of the federal securities laws. The premature disclosure of such a memorandum would necessarily disclose the reasoning process and rationale of the authors of the report and, for this reason, such reports have been held to be exempt under Exemption 5 in their entirety. 67/

Complementing and giving full effect to the Congressional intent, many courts, including the Supreme Court, have held that predecisional memoranda prepared in order to assist an agency decision-maker in arriving at a decision are exempt from disclosure under the FOIA. Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975); National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132 (1975). 68/

67/ See, e.g., Kent Corp. v. National Labor Relations Board, 530 F. 2d 612 (C.A. 5, 1976); Brockway v. Department of the Air Force, 518 F. 2d 1184 (C.A. 8, 1975); Montrose Chemical Corp. v. Train, 491 F. 2d 63 (C.A. D.C., 1974); Safeway Stores, Inc. v. Federal Trade Commission, 428 F. Supp. 346 (D. D.C., 1977).

68/ The Supreme Court has also held that, in the process of evaluating the requestor's need for the document in question, the relevant criterion is whether the document would be available through the civil discovery process, rather than in a criminal discovery context, where "the private party's claim is most compelling." National Labor Relations Board v. Sears, Roebuck & Co.; supra, 421 U.S. at 149 n.16. In this connection, it is clear that, if the Commission instituted a civil injunctive action as a result of its investigation, the report of investigation would not be available through civil discovery, even to a defendant. Securities and Exchange Commission v. National Student Marketing Corp., 68 F.R.D. 157 (D. D.C., 1975); Sterling Drug, Inc. v. Federal Trade Commission, 450 F. 2d 698

In Grumman, the Supreme Court held that reports prepared by the regional boards and divisions of the Renegotiation Board, to be presented to the Board for a final decision as to whether certain government contracts provided for excess profits for contractors, and which contained detailed factual portions summarizing and analyzing information compiled in the course of the staff's inquiry, were just the sort of "predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision" contemplated by the fifth exemption of the FOIA. Id. at 184. The Court reached this conclusion with respect to those memoranda

"[b]ecause only the full Board has the power by law to make the decision whether excess profits exist; because both types of reports involved in this case are prepared prior to that decision and are used by the Board in its deliberations; and because the evidence utterly fails to support the conclusion that reasoning in the reports is adopted by the Board as its reasoning, even when it agrees with the conclusion of a report * * * ." Id. (emphasis in original).

Similarly, here the district court observed that the materials in question are predecisional memoranda on the basis of which the

68/ (footnote continued)

(C.A. D.C., 1971); International Paper Co. v. Federal Power Commission, 438 F. 2d 1349 (C.A. 2, 1971). In Securities and Exchange Commission v. Aldred Investment Trust, 224 F. Supp. 626, 627 (S.D. N.Y., 1963), Judge Weinfeld, in refusing to allow certain discovery to the defendants, stated:

"Neither does the Court agree that the defendants 'are entitled to examine the material which was submitted to the Commission on the basis of which it authorized the institution of this action' * * * . Whether there is a need to institute an action is a matter for the Commission to decide * * * ."

If the defendants in any action which the Commission may institute as a result of the New York City investigation could not obtain the staff's memorandum to the Commission, a fortiori, these records are not available to the plaintiffs herein, who cannot make out a need for, or right to, access greater than any other member of the public.

Commission will determine whether, and with respect to what persons, it is appropriate to pursue the various types of law enforcement alternatives provided for violations of the federal securities laws, as well as whether additional legislation or rules may be necessary (A. 133). These draft materials, as well as the final staff memorandum,

"are thus precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the [agency] in reaching its decision." 69/

Apparently in an attempt to avoid the implications of these cases, the plaintiffs repeatedly told the district court that what they wanted was the "facts," and not the recommendations made by the authors of the report. But, the cases are clear that even the factual matter contained in a memorandum is exempt "when it appears from the face of the document that the writer is intentionally purporting to summarize facts." Morton-Norwick Products, Inc. v. Mathews, supra, 415 F. Supp. at 82. That is the case here, since the only purpose of a report of investigation is, as noted, to select and summarize the relevant facts turned up in the course of the investigation.

In Montrose Chemical Corp. v. Train, supra, 491 F.2d 63, (C.A. D.C., 1974), the court held that even a staff summary of evidence presented at public hearings was protected from disclosure by Exemption 5, since the summary had been prepared by staff members of the Environmental Protection Agency to assist the administrator of the agency in deciding whether to ban DDT. The court stated that the purpose of Exemption 5 was "to protect not simply deliberative material, but also the deliberative process of agencies," and that "[t]o probe the summaries of record evidence would be the same as probing the decision-making process itself." Id. at 71, 68. 70/

69/ Renegotiation Board v. Grumman Aircraft Engineering Corp., supra, 421 U.S. at 186.

70/ See also, United States v. Morgan, 313 U.S. 409, 422 (1941).

Just as was the case in Montrose, the "evaluation and selection of certain facts" by the staff of the Commission could not be disclosed under the FOIA in this case. Id. at 70. Unless in camera inspection is a purely useless gesture, however, the disclosure of such exempt materials is the necessary result of the in camera inspection of the draft material in issue ordered by the district court, and should be halted at its incipient stages. 71/

71/ A similar result was reached in Kent Corp. v. National Labor Relations Board, 530 F.2d 612, 624 (C.A. 5, 1976), where the court held reports of investigation exempt in their entirety, noting:

"In our view, even the factual matters in these reports * * * are protected by the work-product privilege. Writing in contemplation of forthcoming unfair labor practice litigation, an attorney must be able not only to discuss doctrinal theories but also to 'assemble information, [and] sift what he considers to be the relevant from the irrelevant facts' without feeling that he is working for his adversary at the same time. Hickman v. Taylor, 329 U.S. at 511 * * *. The feeling would be well justified if we allowed the FOIA to be used to force disclosure of such materials."

See also, Brockway v. Department of the Air Force, 518 F.2d 1184, 1193-1194 (C.A. 8, 1975), where the court held factual statements of witnesses compiled in a safety report on an airplane crash to be exempt in their entirety. The court indicated that its decision was in accord with the statement of the Supreme Court in National Labor Relations Board v. Sears, Roebuck & Co., supra, 421 U.S. at 151, that the purpose of the long-recognized privilege against disclosure of internal memoranda is "to prevent injury to the quality of agency decisions."

CONCLUSION

For the foregoing reasons, the Commission urges this Court to reverse the orders entered by the court below and remand the action to the district court with directions to dismiss the action. Alternatively, the Commission prays that writs of mandamus and prohibition issue from this Court, prohibiting the Honorable Vincent L. Broderick from exercising his orders entered August 1 and 2, 1977, directing the Commission to produce certain draft memoranda for in camera inspection, and directing the district judge to dismiss the complaint.

Respectfully submitted,

HARVEY L. PITT
General Counsel

JAMES H. SCHROPP
Assistant General Counsel

Securities and Exchange Commission
Washington, D.C. 20549
(202)755-1108

Dated: August 15, 1977

AFFIDAVIT OF WILLIAM D. MORAN, AUGUST 11, 1977

(Pages 1b-3b)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- -x
JOEL HARNETT, et al.,

Plaintiffs-Appellees,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellant,

and

EXECUTIVE OFFICE OF THE PRESIDENT OF
THE UNITED STATES,

Defendant.
----- -x

Docket No. 77-6124

AFFIDAVIT

STATE OF NEW YORK)

COUNTY OF NEW YORK)

ss:

WILLIAM D. MORAN, having been duly sworn, deposes and
says:

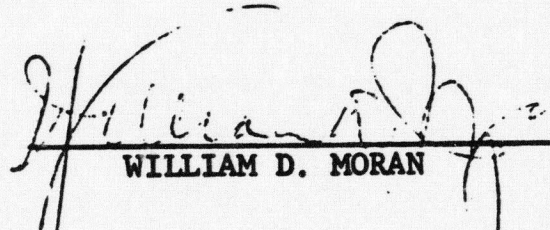
1. I am the Regional Administrator of the New York
Regional Office of the Securities and Exchange Commission
("Commission"). I make this affidavit to supplement my
affidavits of July 26, 1977 (A. 64-65) and July 28, 1977
(A. 180-182) submitted to the district court, and in sup-
port of the Commission's applications to this Court.

2. On January 8, 1976 the Commission publicly announced that the staff had commenced a private investigation concerning transactions in securities of the City of New York. As I have previously stated (July 28, 1977 Aff. ¶4), members of my staff are presently engaged in organizing, indexing and analyzing the information received to date and are writing a report of investigation for review by the staff at the Commission's Headquarters and ultimate submission, as a predecisional staff memorandum, to Chairman Williams and the other Commissioners.

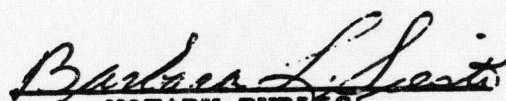
3. The instant investigation, however, is continuing. Even since the entry of Judge Broderick's stay order of August 4, 1977, Commission staff members authorized to conduct the investigation have found it necessary to issue and serve, pursuant to Section 21 of the Securities Exchange Act of 1934 (15 U.S.C. 78u), ten subpoenas duces tecum upon various entities. Additional subpoenas may be issued shortly.

4. On August 8, 1977, pursuant to Section 17 of the Securities Exchange Act of 1934 (15 U.S.C. 78q), the staff commenced a special examination of certain books and records of a broker-dealer registered with the Commission concerning transactions by

that firm in the New York City securities. Similar special examinations of a number of other registered entities will commence shortly.


WILLIAM D. MORAN

Sworn to before me this
11th day of August 1977


NOTARY PUBLIC

BARBARA L. SIESTO
Notary Public, State of New York
No. 3662862
Qualified in Orange County
Commission Expires March 30, 1979

[- 3 -]

-3b-

STATUTORY APPENDIX

(pages 1c - 14c)

Section 21(a) of the Securities Exchange Act, 15 U.S.C. 78u(a), as amended by the Securities Acts Amendments of 1975, P.L. 94-29 (June 4, 1975), provides:

Section 21(a). The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this title, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.

The Freedom of Information Act, 5 U.S.C. 552, provides:

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(Freedom of Information Act continued):

(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying —

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used or cited as precedent by an agency against a party other than an agency only if —

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(Freedom of Information Act continued):

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer

(Freedom of Information Act continued):

or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection on a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall —

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request —

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if

(Freedom of Information Act continued):

the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are —

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(Freedom of Information Act continued):

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include —

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(Freedom of Information Act continued):

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

The Rules Promulgated by the Securities and Exchange Commission Pursuant to the Freedom of Information Act, as set forth in 17 CFR 200.80, provide:

§ 200.80 Commission records and information.

(a) (1) *Information published in the Federal Register.* Except as provided in paragraph (b) of this section the following materials are published in the *Federal Register* for the guidance of the public:

(i) Description of the Commission's central and field organization and the established places at which, the employees from whom, and the methods whereby the public may obtain information, make submittals or requests, or obtain decisions;

(ii) Statements of the general course and method by which the Commission's functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(iii) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(iv) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Commission; and

(v) Each amendment, revision, or repeal of the foregoing; and

(vi) The notice of Commission meetings described in § 200.403, but only to the extent, and under the conditions, specified in § 200.403.

(2) *Records available for public inspection and copying; documents published and indexed.* Except as provided in paragraph (b) of this section, the following materials are available for public inspection and copying during normal business hours at the public reference room located at 1100 L Street NW., Washington, D.C. and at the Regional Offices of the Commission, and, except for indices, they are also published weekly by the Government Printing Office in a document entitled "*SEC Docket*" (see paragraph (f) (2) of this section):

(i) Final opinions of the Commission, including concurring and dissenting opinions, as well as orders made by the Commission in the adjudication of cases;

(ii) Statements of policy and interpretations which have been adopted by the Commission and are not published in the *Federal Register*;

(Commission Rules under the FOIA continued):

(iii) Administrative staff manuals and instructions to staff that affect a member of the public;

(iv) A record of the final votes of each member of the Commission in every Commission proceeding concluded after July 1, 1967; and

(v) Current indices (published quarterly or more frequently) providing identifying information to the public as to the materials made available pursuant to paragraphs (a) (2) (i), (ii) and (iii) of this section which have been issued, adopted or promulgated after July 1, 1967, and such other indices as the Commission may determine.

(3) *Other records available upon request.* Except with respect to the records made available under paragraphs (a) (1) and (2) of this section, and subject to the provisions of paragraph (b) of this section, pertaining to nonpublic matters, the Commission, upon request for records which (i) reasonably describes such records and (ii) is made in accordance with the rules set forth in paragraphs (d) and (e) of this section, stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person. A compilation of records generally available at the public reference room at the principal office of the Commission appears below as Appendix A to this section (17 CFR 200.80a).

(4) *Records available with identifying details deleted.* To the extent required to prevent a clearly unwarranted invasion of personal privacy, identifying details may be deleted from materials made public as set forth in paragraphs (a) (1), (2), and (3) of this section, e.g., apparently defamatory statements made about any person, information received by or given to the Commission in confidence, or any contents of personnel and medical and similar files. In addition, certain materials which are considered to be nonpublic, as described in paragraph (b) of this section may, as authorized by the Commission from time to time, be made available for public inspection and copying in an abridged or summary form or with identifying details deleted.

(b) *Nonpublic matters.* Certain records are nonpublic, but any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are considered nonpublic under the paragraph (b) of this section. Except for

such reasonably segregable portions of records, the Commission will generally not publish or make available to any person matters that are:

(1) (i) Specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy, and (ii) are in fact properly classified pursuant to such executive order.

(2) Related solely to the internal personnel rules and practices of the Commission or any other agency, including, but not limited to:

(i) Operation rules, guidelines, and manuals of procedure for investigators, attorneys, accountants, and other employees other than those which establish legal requirements to which members of the public are expected to conform; or

(ii) Hiring, termination, promotion, discipline, compensation, or reward of any Commission employee or member, the existence, investigation, or disposition of a complaint against any Commission employee or member, the physical or mental condition of any Commission employee or member, the handling of strictly internal matters, matters which would tend to infringe on the privacy of the staff or members of the Commission, or similar subjects.

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552): *Provided*, That such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(4) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential, including, but not limited to:

(i) Information contained in letters of comment in connection with registration statements, applications for registration or other material filed with the Commission, replies thereto, and related material which is deemed to have been submitted to the Commission in confidence or to be confidential at the instance of the registrant or person who has filed such material unless the contrary clearly appears; and

(ii) Information contained in any document submitted to or required to be filed with the Commission where the Commission has undertaken formally or

(Commission Rules under the FOIA continued):

informally to receive such submission or filing for its use or the use of specified persons only, such as preliminary proxy material filed pursuant to Rule 14a-6 under the Securities Exchange Act (17 CFR 240.14a-6) or preliminary information statements filed pursuant to Rule 14c-5 (17 CFR 240.14c-5) before definitive material has been filed with the Commission, reports filed pursuant to Rule 216(a) under the Securities Act (17 CFR 230.216(a)), agreements filed pursuant to Rule 15c-3-1(c)(7)(G) under the Securities Exchange Act (17 CFR 240.15c-3-1(c)(7)(vii)), schedules filed pursuant to Part II of Form X-17A-5 (17 CFR 249.517) in accordance with Rule 17a-5(b)(3) under the Securities Exchange Act (17 CFR 240.17a-5(b)(3)), statements filed pursuant to Rule 17a-6(k)(1) under the Securities Exchange Act (17 CFR 240.17a-6(k)(1)), and confidential reports filed pursuant to Rules 17a-9, 17a-10, 17a-12 and 17a-16 under the Securities Exchange Act (17 CFR 240.17a-9, 240.17a-10, 240.17a-12, and 240.17a-16); and

(iii) Information contained in reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of or in connection with an examination or inspection of the books and records of any person or any other investigation.

(5) Interagency or intra-agency memoranda or letters, including generally records which reflect discussions between or consideration by members of the Commission or members of its staff, or both, of any action taken or proposed to be taken by the Commission or by any member of its staff, and specifically, reports, summaries, analyses, conclusions, or any other work product of members of the Commission or of attorneys, accountants, analysts, or other members of the Commission's staff, prepared in the course of an inspection of the books or records of any person whose affairs are regulated by the Commission, or prepared otherwise in the course of an examination or investigation or related litigation conducted by or on behalf of the Commission, except those which by law would routinely be made available to a party other than an agency in litigation with the Commission.

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, including those concerning all employees of the Commission and those concerning per-

sons subject to regulation by the Commission, such as personal information about employees of brokers or dealers reported to the Commission pursuant to Rule 15b8-1(a)(2)(iii) under the Securities Exchange Act (17 CFR 240.15b8-1(a)(2)(iii)).

(7)(i) Investigatory records compiled for law enforcement purposes to the extent that the production of such records would: (A) Interfere with enforcement activities undertaken or likely to be undertaken by the Commission or the Department of Justice, or any United States Attorney, or any federal, state, local, or foreign governmental authority, any professional association, or any securities industry self-regulatory organization; (B) deprive a person of a right to a fair trial or an impartial adjudication; (C) constitute an unwarranted invasion of personal privacy; (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source; or (E) disclose investigative techniques and procedures; or (F) endanger the life or physical safety of law enforcement personnel.

(ii) The term "investigatory records" includes, but is not limited to, all documents, records, transcripts, evidentiary materials of any nature, correspondence, related memoranda, or work product concerning any examination, any investigation (whether formal or informal), or any related litigation, which pertains to, or may disclose, the possible violation by any person of any provision of any statute, rule, or regulation administered by the Commission, by any other federal, state, local, or foreign governmental authority, by any professional association, or by any securities industry self-regulatory organization. The term "investigatory records" also includes all written communications from, or to, any person complaining or otherwise furnishing information respecting such possible violations, as well as all correspondence or memoranda in connection with such complaints or information.

(8) Contained in, or related to, any examination operating, or condition report prepared by, on behalf of, or for the use of, the Commission, any other federal, state, local, or foreign governmental authority, or any securities industry self-

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regulatory organization, responsible for the regulation or supervision of financial institutions.

(9) Geological and geophysical information and data, including maps, concerning wells.

(c) (1) *Public reference facilities.* The Commission has a specially staffed and equipped public reference room located at 1100 L Street, NW, Washington, D.C. (Phone No. 202-523-5506) and public reference facilities in the New York Regional Office, 26 Federal Plaza, New York, New York 10007 (212-264-1615), Los Angeles Regional Office, 312 North Spring Street, Los Angeles, California 90012 (212-473-4511), and Chicago Regional Office, 319 South Dearborn Street, Chicago, Illinois 60604 (312-353-7433). Some facilities for public use are also provided in other regional offices. A contractor maintains coin-operated machines in the public reference rooms in Washington, D.C., and at the Commission's regional offices in New York City, Los Angeles and Chicago. These machines, which are operated by customers on a do-it-yourself basis, can be used to make immediate copies up to 8½ by 14 inches in size of materials that are available for inspection in those offices.

(i) The public reference room in Washington has available for public examination all of the publicly-available records of the Commission as described in paragraph (a) of this section.

(ii) All regional offices have available for public examination the materials set forth in paragraph (a) (2) of this section, as well as copies of prospectuses used in recent offerings of securities registered under the Securities Act; registration statements and recent annual reports filed pursuant to the Securities Exchange Act of companies having their principal office in their respective regions; active broker-dealer and investment adviser applications originating in their respective regions; and Regulation A (17 CFR 300.251 et seq.) letters of notification filed in their respective regions. Certain of the materials described in paragraph (a) (1) of this section may also be available at particular regional offices.

(iii) In the New York, Chicago and Los Angeles Regional Offices, microfiche of all recent registration statements filed pursuant to the Securities Act of 1933, registration statements and periodic reports filed pursuant to the Securities Exchange Act of 1934, and periodic reports

filed pursuant to the Investment Company Act from 1969 to date are available for inspection and reproduction.

(2) *Public reference inquiries.* Inquiries concerning the nature and extent of records available at the Commission's public reference room in Washington or at its other public reference facilities may be made in person or by telephone. The addresses and telephone numbers of all Commission Regional and Branch Offices are set forth at paragraph (c) (1) of this section. Written inquiries may be addressed to the Public Reference Section, 500 North Capitol Street, Washington, D.C. 20549, or to a particular regional office.

(d) *Requests for Commission records and copies thereof.*—(1) *Time and place of request for inspection of records.* Requests for inspection of Commission records may be made in person during normal business hours at the public reference room located at 1100 L Street, NW, Washington, D.C. Requests for inspection of Commission records located in a regional office may be made in person during normal business hours at that regional office.

(2) *Requests for copies of records.* Requests for copies of Commission records may be made either in person at the public reference room or by mail addressed to the Securities and Exchange Commission, Public Reference Section, Washington, D.C. 20549. Each request for information under the Freedom of Information Act should be clearly and prominently identified by means of a legend on the first page, such as "Freedom of Information Act Request." In addition, if sent by mail or otherwise submitted in an envelope or other cover, the front of such envelope or cover should be clearly and prominently marked by a legend such as "Freedom of Information Act Request."

(3) *Description of requested records.* Each request for Commission records or copies thereof shall reasonably describe the records sought with sufficient specificity with respect to names, dates and subject matter to permit the records to be located among the records maintained by or for the Commission. A person who has requested Commission records or copies thereof will be promptly advised if the records cannot be located on the basis of the description given and that further identifying information must be provided before his request can be satisfied.

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(4) *Normal availability.* Records or copies will normally be made available either immediately upon receipt of a request or within ten days thereafter, unless the request relates to matters that are generally non-public as described in paragraph (b) of this section.

(5) *Initial determinations, denials.* With respect to any record that is generally considered nonpublic as described in paragraph (b) of this section, the Freedom of Information Act Officer of the Commission will determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of a request for inspection of the record or for a copy (or within such extended period as may be permitted in accordance with subparagraph (7) of paragraph (d)) whether to comply with such request, and shall immediately notify the person making such request of such determination, and, where it is determined not to comply, the reasons therefor, and of the right of such person to appeal to the Commission any adverse determination: *Provided*, That a Director of a staff Division of the Commission or Office head whose some of responsibility relates to the record requested (See 17 CFR 200.13, *et seq.*) may make a determination that the record or copy is not lawfully required to be made available and should not be made available, in which case he, and not the Freedom of Information Act Officer, shall make the required notification. The notification of denial of any request for records shall set forth the name and title or position of each person responsible for the denial.

(6) *Administrative review.* Any person who has been notified pursuant to paragraph (d) (5) of this section that his request for inspection of a record or for a copy has been denied, or who has received no response to a request for a record or copy within ten days (or within such extended period as may be permitted in accordance with paragraph (d) (7) of this section) after his request was received by the Commission's staff, may appeal the adverse determination or the failure to respond by applying for an order of the Commission determining and directing that the record be made available.

(i) The application shall be in writing, shall be clearly and prominently identified on the envelope or other cover and at the top of the first page by a legend such as "Freedom of Information Act Appeal," and shall identify the record

in the form in which it was originally requested.

(ii) The application should be delivered to the Office of the Freedom of Information Act Officer or sent by mail to the Securities and Exchange Commission, Public Information Officer, Washington, D.C. 20549.

(iii) The applicant may, if he wishes, state such facts and cite such legal or other authorities as the applicant may consider appropriate.

(iv) The Commission may determine to withhold any record that is exempt from the disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552, although it may disclose a record, even if exempt, if the application shows good cause why it should do so.

(v) The Commission will make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays and legal public holidays) after the receipt of such appeal or within such extended period as may be permitted in accordance with paragraph (d) (7) of this section.

(vi) If on appeal the denial of the request for a record or a copy is in whole or in part upheld, the Commission will advise the person making such request of the denial, shall notify him of the names and positions of the members of the Commission responsible for the denial and shall notify him of the provisions for judicial review of that determination that are set forth at 5 U.S.C. 552 (a) (4).

(7) *Extension of time to consider requests and to consider administrative appeals.* In unusual circumstances, as specified in this paragraph, the time limits prescribed in either paragraphs (d) (5) or (6) of this section may be extended by written notice to the person making a request for a record or a copy, setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this paragraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request. Many records of the Commission are stored in Federal Records Centers in so-

(Commission Rules under the FOIA continued):

accordance with law—including many of the documents which have been on file with the Commission for more than 2 years—and cannot be made available for several days after a request has been made. Other records may temporarily be located at a regional or branch office of the Commission. Any person who has requested for personal examination a record stored at the Federal Records Center or temporarily located in a regional or branch office of the Commission will be notified when the record will be made available to him at the public reference room of the Commission. Any person who has ordered a copy of such record will be provided with a copy as soon as practicable.)

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request. (While every reasonable effort will be made fully to comply with each request as promptly as possible on a first-come, first-served basis, work done to search for, collect and appropriately examine records in response to a request for a large number of records will be contingent upon the availability of processing personnel in accordance with an equitable allocation of time to all members of the public who have requested or wish to request records.)

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components within the Commission having substantial subject-matter interest therein.

(8) *Inability to comply with time requirements.* If the Commission should be unable to comply with the applicable time limits contained in this paragraph (d) of this section in responding to a request for records, it shall receive written notice of the reason for delay to the person who made the request and shall be prepared to demonstrate to a court, if need be, the existence of exceptional circumstances and that the Commission is exercising due diligence in responding to the request for records.

(i) *Records in use for another member of the public.* Any record being inspected by or copied for another member of the public will be made available as soon as practicable.

(ii) *Records in use by a member of the Commission or its staff.* Although every

effort will be made to make a record in use by a member of the Commission or its staff available when requested, it may occasionally be necessary to delay making such a record available when doing so at the time the request is made would seriously interfere with the work of the Commission or its staff.

(iii) *Missing or lost records.* Any person who has requested a record or copy will be notified if the record sought cannot be found. If he so requests, he will be notified if it should subsequently be located.

(9) *Oral requests; misdirected written requests.*—(i) *Telephone and other oral requests.* While the Commission's staff will attempt in good faith to comply with requests for copies of records made orally, by telephone or otherwise, the Commission cannot assure a timely or satisfactory response to such requests due to the risk of misunderstanding inherent in the use of oral communication. The Commission will not entertain any appeal from an alleged denial or failure to comply with an oral request. Any person who has orally requested a copy of a record that he believes to have been improperly denied to him should resubmit his request in appropriate written form in order to obtain proper consideration and, if need be, administrative review.

(ii) *Misdirected written requests.* The Commission cannot assure that a timely or satisfactory response will be given to written requests for inspection or copies of records that are directed to the Commission other than in the manner prescribed in paragraphs (d) (1) and (3) of this section. Any staff member who receives a written request for records should promptly forward the request to the Public Reference Section. Misdirected requests for records will be considered to have been received for purposes of paragraph (d) of this section only when they have been actually received by the Public Reference Section. The Commission will not entertain any appeal from an alleged denial or failure to comply with a misdirected request, unless it is clearly shown that the request was in fact received by the Public Reference Section.

(c) *Fees for records services.* A current schedule of fees for record services, including locating and making records available, attestations and copying, appears in Appendix E to this Subpart D, 37 CFR 200.80a. Copies of the current schedule of fees may also be obtained

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upon request made in person, by telephone or by mail from the public reference room or at any regional office of the Commission.

(1) *Services requiring one-half man-hour or less.* No fee will be charged when one-half man-hour or less is required to locate and make available records requested for inspection or for copying.

(2) *Services requiring more than one-half man-hour.* A fee will be charged as provided in the Commission's current schedule of fees when more than one-half man-hour of work is devoted to locating and making available for inspection or for copying records requested by a person, except that no such fee will be charged in connection with any record which is not made available because:

(i) It is found to be nonpublic as described in paragraph (b) of this section; or

(ii) After reasonable search, a record adequately identified cannot be located: *Provided*, That a fee will be charged if after the person who requested the record or copy has been notified that it cannot be located, the search is continued beyond that time at his insistence.

(3) *Requests requiring large expenditures.* A request for Commission records may state that the requesting person is willing to pay fees up to a stated limit for services to be provided in locating and making available requested records. In such circumstances, no work will be done that will result in fees beyond the stated limit without further written authorization. If no limit is initially stated by the person requesting records or copies, services in locating and making available the requested records will not be done so as to exceed fees of \$25 (exclusive of applicable copying charges) without the express written authorization by the requesting person, and he will be so advised.

(4) *Waiver or reduction of fees.* Requested records shall be furnished without charge or at reduced charge whenever it shall be determined by the Commission that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Requests for waiver or reduction of fees may be submitted with the original request for records and may state such facts as the requester may consider appropriate. Such requests will promptly be brought to the Commission's attention.

(5) *Records obtained from Federal Records Centers.* When, to fill a request for inspection or copying, records are required to be obtained from a Federal Records Center, fees, in addition to those provided on the Commission's current schedule of fees, will be charged to the extent authorized or required by rules or regulations promulgated by the General Services Administration.

(6) *Attestations.* In addition to any other fees or charges which may apply, a fee will be charged for records attestations as provided in the Commission's current schedule of fees. The seal of the Commission will be affixed to all attestations without additional charge.

(7) *Copying services.* Copies of public records filed with or retained by the Commission, or portions thereof, will be provided subject to fees established by agreement between the Commission and a private contractor as set forth in the Commission's current schedule of fees.

(i) *Facsimile copies.* All requests for facsimile copies may be made either in person at the Commission's public reference room, 1100 L Street, NW, Washington, D.C. or by mail addressed to the Securities and Exchange Commission, Public Reference Section, Washington, D.C. 20549. Copies when authorized will be sent directly to the purchaser by the contractor unless attestation is requested. A person who has been provided with facsimile copies of records upon request will be billed by the contractor for his copying services at rates shown in the Commission's current schedule of fees, plus postage, if any, and will be billed separately by the Commission for attestation and searching fees, if any. Special classes of copying services, including expedited delivery, to the extent available under the current contract, are described in the Commission's current schedule of fees. Cost estimates with respect to facsimile copying will be supplied upon request.

(ii) *Microform copies.* A contractor also makes available to the public microform copies of certain public documents on file with the Commission, at prices and on terms governed by its contract with the Commission. Microform services include subscription microfiche service on an annual basis. Requests concerning the types and cost of microform services, orders for copies or subscriptions, and payment should be addressed directly to the contractor, the name and address of

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which is set forth in the Commission's current schedule of fees.

(iii) *Transcripts of public hearings.* Copies of the transcripts of recent public hearings may be obtained from the reporter subject to the fees established annually by contract between the Commission and the reporter. Copies of that contract, which contains tables of charges, may be inspected in the public reference room, 1100 L Street NW., Washington, D.C. and in each regional and branch office. Copies of other public transcripts may be obtained, in the manner of other Commission records, subject to the charges referred to in paragraph (e) (7) (i) of this section.

(f) *Releases and publications.* (1) The Commission's decisions, reports, orders, rules and regulations are published initially in the form of releases and distributed to the press. Certain decisions and reports thereafter are printed in bound volumes entitled "Securities and Exchange Commission Decisions and Reports"; these volumes may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(2) The Commission publishes daily the *SEC News Digest*, which summarizes the releases published by the Commission each day, contains Commission announcements, and lists certain filings with the Commission. The Commission publishes weekly the *SEC Docket*, which prints in full the text of every Commission release. Subscriptions to the *SEC News Digest* and the *SEC Docket* may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

(3) The Commission publishes an annual report to the Congress which sets forth the result of the Commission's operations during the past fiscal year under the various statutes committed to its charge. Copies may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

(4) The Commission also makes other information in the fields of securities and finance, including economic studies, available to the public through the issuance of releases on specific subject matters.

(5) A classification of the releases available from the Commission appears below as Appendix B to this section (17 CFR 200.80b). Other publications available from the Commission are set forth

in Appendix C to this section (17 CFR 200.80c). Copies of statutes, rules and regulations, and miscellaneous publications set forth in Appendix D to this section (17 CFR 200.80d) may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(5 U.S.C. 522b). (40 FR 5799, Mar. 2, 1975, as amended at 40 FR 57449, Dec. 10, 1975; 41 FR 55785, Dec. 9, 1976; 42 FR 14993, Mar. 16, 1977)